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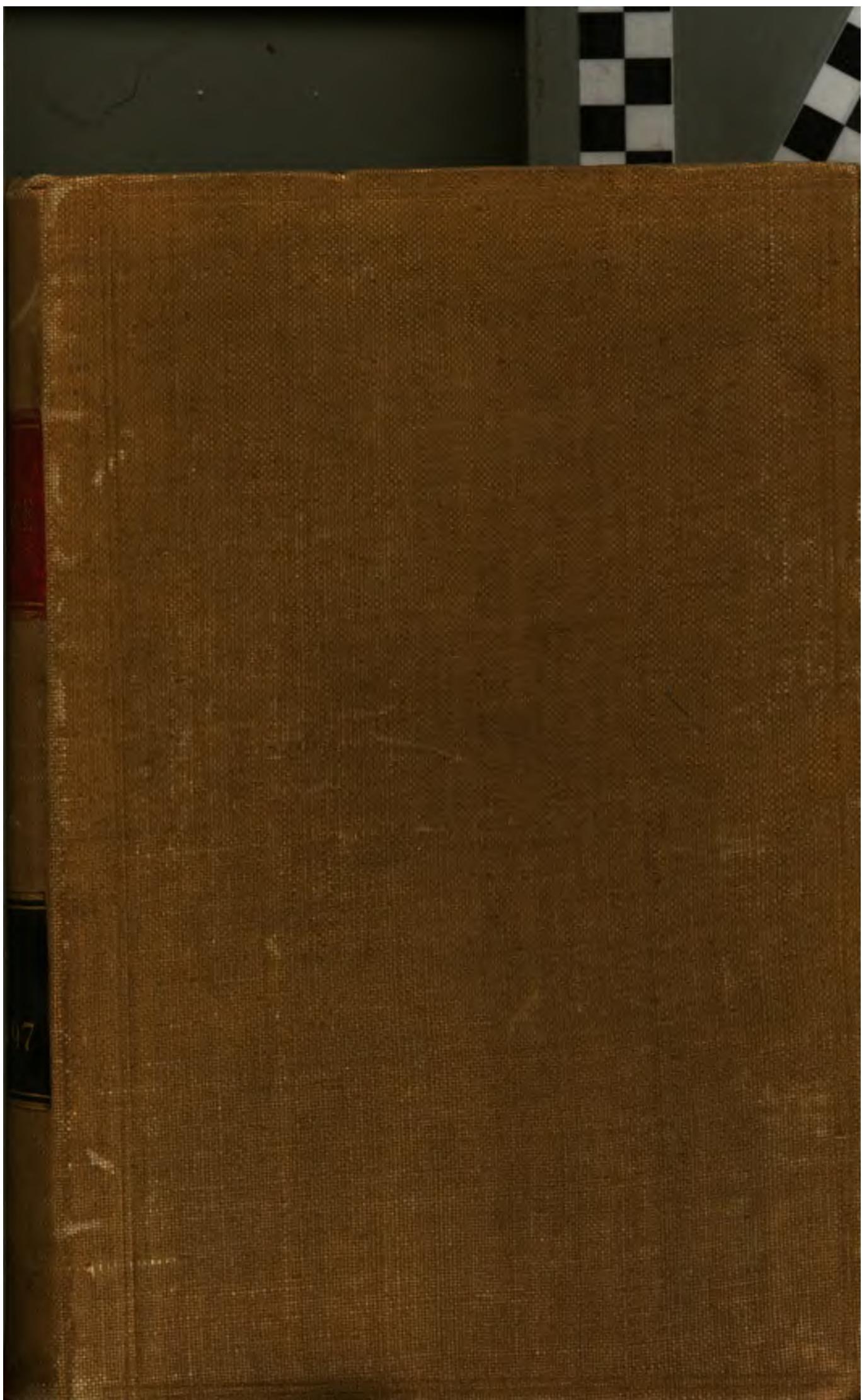
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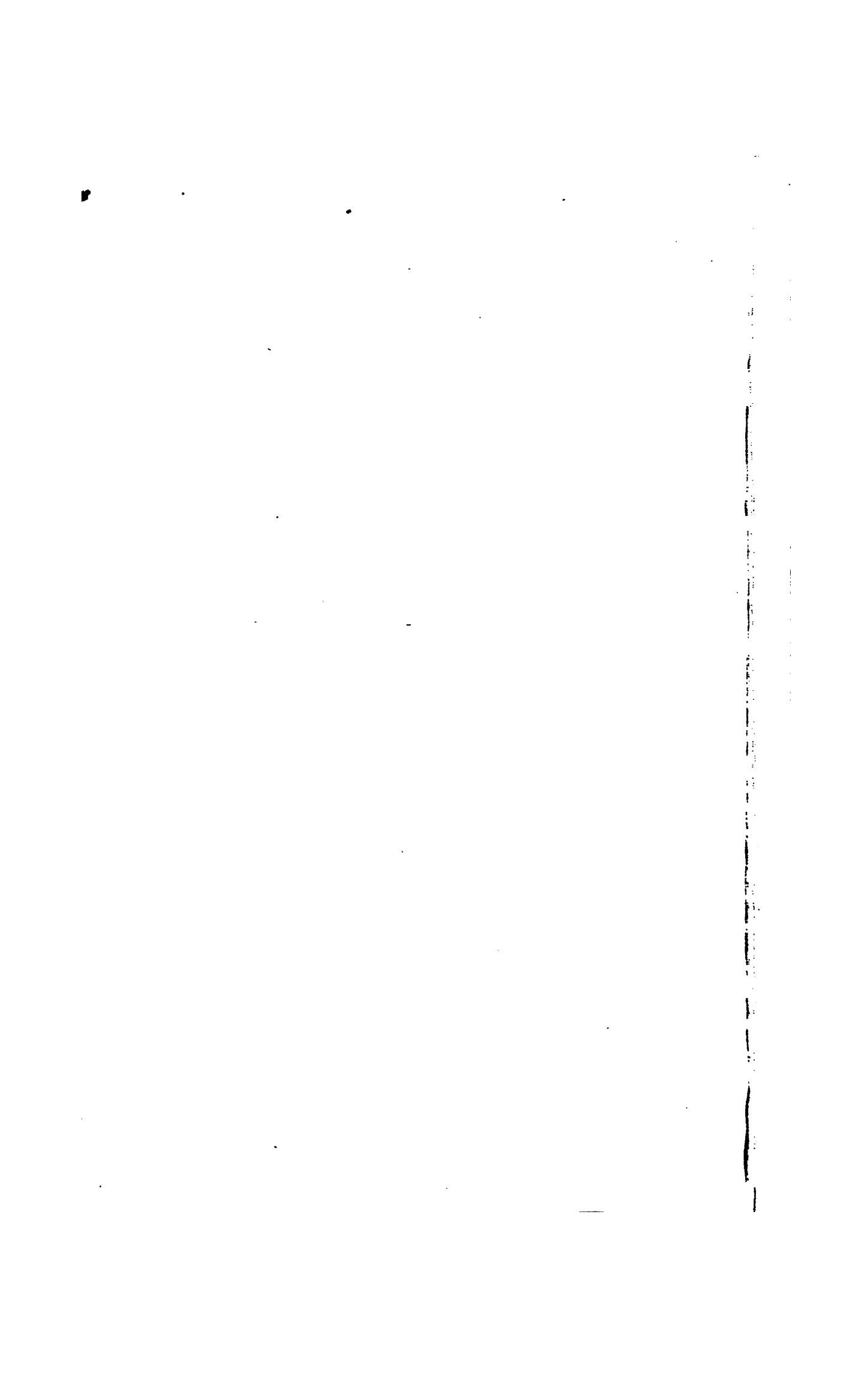
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FEDERAL EQUITY PRACTICE

*A Treatise on the Pleadings Used and Practice Followed in Courts
of the United States in the Exercise of their Equity Jurisdiction*

BY

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VOLUME III.

CHAPTER LIV.

BILL OF INTERPLEADER.

Equity of Interpleading.

- § 2235. When Right to Interplead Arises.
- 2236. Basis of Jurisdiction to Entertain Suit.
- 2237. Illustration of Bill of Interpleader.
- 2238. Conditions Essential to Maintenance of Suit.
- 2239. Adverse Interests of Claimants.
- 2240. Titles or Interest of Several Claimants Must Be Connected.
- 2241. Plaintiff Must Have No Interest in Subject of Suit.
- 2242. Plaintiff Must Not Be Independently Liable to Either Claimant.
- 2243. Bill in Nature of Bill of Interpleader.

Formalities Incident to Bill of Interpleader.

- 2244. Contents of Bill.
- 2245. Offer to Bring Fund into Court.
- 2246. Prayer of Bill.
- 2247. Affidavit of Noncollusion.
- 2248. Proceedings on Bill of Interpleader.
- 2249. Pleadings of Codefendants—Cross Bill.
- 2250. Proceedings on Cross Bill among Defendants.
- 2251. Decree of Interpleader.
- 2252. Final Decree as between Codefendants.
- 2253. Costs and Expenses of Suit.
- 2254. When Interest on Fund Not Chargeable to Claimant.

Interpleading as to Fund Already in Court.

- 2255. Order Granted without Formal Bill of Interpleader,
- 2256. Orders in Nature of Orders of Interpleader,

*Equity of Interpleading.***§ 2235. When Right to Interplead Arises.**

The subject of interpleader is one of the distinct heads of equity, and the treatment of it might with some propriety be relegated to the field of equity jurisprudence, with which it is not within the compass of this work to deal. But the bill of interpleader has some distinctive features of its own; and in accordance with the custom of writers on equity pleading and practice, we shall here proceed briefly to indicate the grounds upon which this bill can be maintained and to describe the nature of the bill and the procedure incident to suits of interpleader.

The right to file a bill of interpleader arises where any person finds himself in the possession of a fund or property belonging to some one else, or where he is charged with the performance of some obligation, or owes some debt to another, and yet the identity of the person to whom the fund or property is properly deliverable or to whom the obligation ought to be performed is doubtful or uncertain, by reason of the fact that there are two or more different claimants each demanding the fund or property or severally insisting on the performance of the obligation to them. In such case, the party having the property or being subject to the obligation can file a bill of interpleader against the several claimants, requiring them to come into court and assert their claims. The conditions under which the equity arises has been otherwise stated as follows: "Where two or more persons, whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader."¹

§ 2236. Basis of Jurisdiction to Entertain Suit.

The jurisdiction of the court of equity to entertain a bill of interpleader is apparently only one manifestation of its general jurisdiction to prevent a multiplicity of suits. It depends on the fact that distinct claims are made, and it is immaterial whether the claims are of a legal or equitable nature or partly legal and partly equitable.²

¹ 3 Pom. Eq. Jur. 1320; Mitt. Eq. Pl. McWhirter v. Halsted (1885) 24 Fed. (Tyler's ed.) 147; Story, Eq. Pl. 291; 829.

² Barb. Ch. Pr. 117; Louisiana State Lottery Co. v. Clark (1883) 16 Fed. 20; ³ 3 Pom. Eq. Jur. 1321.

The purpose of the bill is not so much to protect the plaintiff against a double liability as it is to protect him against double vexation in respect of one liability. It is of the essence of an interpleading suit that the plaintiff shall be liable to only one of the claimants; and the relief the court affords him is against the vexation of two proceedings in a matter that may be settled in a single suit.³

§ 2237. Illustration of Bill of Interpleader.

A very simple and common illustration of the situation justifying the filing of a bill of interpleader is found in the case where a life insurance policy matures, and the company, while not disputing its liability on the contract, is yet unable to decide to which one, among several claimants, it should pay the proceeds of the policy. In such case the company may file its bill of interpleader against all the claimants, pay the money into court, and ask that the rights of the various parties be determined.⁴ The following case furnishes an illustration of interpleader brought against two defendants, one of whom claimed as assignee in insolvency and the other as an attaching creditor of the common debtor.

McWhirter v. Halsted (1885) 24 Fed. 828: One H made an assignment for the benefit of creditors. Among the choses in action passing to the assignee was a debt owing to the insolvent from a debtor M, living in another state. The assignee sued at law in the federal court to recover this debt. But another creditor had meanwhile attached the same debt in the court of the state where M lived, and claimed the money under the attachment. The debtor M thereupon filed an interpleader against the assignee and the attaching creditor and asked for injunctions against the suits at law. The situation was held to be a proper one for an interpleader and the injunction against the prosecution of the suit at law brought in the federal court by the assignee was granted.⁵

§ 2238. Conditions Essential to Maintenance of Suit.

The following four conditions have been enumerated as being essential to justify a suit of interpleader: (1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; (2) all their adverse titles or claims must be

³ *Crawford v. Fisher* (1842) 1 Hare, 430, 441. ⁵ But the injunction against the attachment suit in the state court was refused, because of the statute which

⁴ *Spring v. South Carolina Ins. Co.* (1823) 8 Wheat. 288, 5 L. ed. 614; *Aetna Nat. Bank v. United States Life Ins. Co.* (1885) 25 Fed. 531; *Penn Mut. Life Ins. Co. v. Union Trust Co.* (1897) 83 Fed. 891. For the form of bill in such cases, out of a spirit of comity, upon a proper showing being made to it. *Loeb* (1901) 115 Fed. 857.

dependent, or be derived from a common source; (3) the person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter; (4) he must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder.⁶ Of these four conditions something must be severally said.

§ 2239. Adverse Interests of Claimants.

1. Before a bill of interpleader will lie the claimants between or among whom the plaintiff seeks to compel the interpleading must appear to be asserting adverse rights in respect to the same obligation or thing. If the title to *x* is in controversy, and A brings it into court and seeks to force B and C to litigate their respective rights to it, the bill must show that B and C both have a claim or are asserting an interest in this particular thing, *x*. “No case of interpleader can be made, unless the adverse claimants seek to recover the same thing, debt, or duty.”⁷

§ 2240. Titles or Interests of Several Claimants Must Be Connected.

2. According to the foregoing analysis, the second requisite of the bill of interpleader is that the adverse titles of the claimants must be connected, or dependent, or one derived from the other, or both derived from a common source; or as is otherwise stated, there must be some privity among the titles or interests of the respective claimants.⁸ If a person who has a legal demand for a sum of money assigns his interest, the debtor may compel the assignor and assignee to interplead. So an auctioneer may maintain a bill of interpleader between a vendor and purchaser who both claim the deposit money at a sale, he being deemed an agent for both parties.⁹

Where the claimants assert their rights under totally different titles having no privity or connection, and where their claims are of different nature, the bill cannot be maintained. Thus a tenant liable to pay rent may file a bill of interpleader where there are several persons claiming title to it in privity of contract, or of tenure, to compel them to ascertain to whom it is properly payable. But if a mere stranger sets up a claim to the rent by a title paramount, and not in privity of contract or tenure, or sets up a claim of a different nature—such as a claim to mesne profits in virtue of his title paramount—

⁶ 3 Pom. Eq. Jur. 1322. Professor Pomeroy's analysis is referred to and judicially approved in Wells, Fargo & Co. v. Miner (1886) 25 Fed. 533, 537. ⁷ Standley v. Roberts (C. C. A.; 1894) 59 Fed. 836, 8 C. C. A. 305. ⁸ 3 Pom. Eq. Jur. 1324; 2 Barb. Ch. Pr. 119. ⁹ 2 Barb. Ch. Pr. 119.

no bill of interpleader will lie on behalf of the tenant; for the debt or duty is not of the same nature.¹⁰

The exact basis of the rule that prohibits the interpleader from being maintained where the titles of the claimants are unconnected, or not in privity, is uncertain; and there is good reason to believe that the rule is unsound in principle.¹¹ While the federal courts have not formally repudiated the rule, they have shown no disposition to give it a liberal interpretation; and it has been held that a state statute declaring the right of interpleader to exist though the respective titles or claims of the parties have no common origin, may be given effect in the federal court of equity as enlarging equitable rights.¹²

§ 2241. Plaintiff Must Have No Interest in Subject of Suit.

3. It is indispensable in the pure bill of interpleader that the plaintiff himself should be a wholly disinterested stakeholder, and he must personally have no interest in the subject-matter.¹³ A bill does not become a bill of interpleader merely because the plaintiff calls upon the defendants to define their claim, disclose their title, and interplead concerning the same, while at the same time the plaintiff himself asserts an interest in the property.¹⁴ A plaintiff who, instead of admitting title to be in one or the other of the claimants, sets up a trust title in himself for the benefit of one of the claimants and seeks relief against the other, or others, cannot maintain the bill as a bill of interpleader.¹⁵

The interest that will defeat the plaintiff's right to maintain the bill of interpleader must be a substantial interest in the thing or fund that is the subject of controversy. A mere interest in the legal question at issue will not defeat the plaintiff's right to maintain the bill;¹⁶ nor is a mere lien or charge on the thing, or a remote interest in it, enough.

McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.; 1902) 114 Fed. 910, 52 C. C. A. 530: A policy of insurance stipulated for the payment, at its matur-

¹⁰ 2 Barb. Ch. Pr. 119.

¹¹ The rule in question originated in *Crawshay v. Thornton* (1836) 2 Myl. & C. 1. It has been abrogated in England by the Procedure Act, *Attenborough v. London etc. Dock Co.* (1878) L. R. 3 C. P. Div. 450; and the doctrine could hardly be sustained at this time in England even apart from the statute. See observation of Sawyer, J., in *Wells*,

Fargo & Co. v. Miner (1885) 25 Fed. 538; 3 Pom. Eq. Jur. 1324, note.

¹² *Wells, Fargo & Co. v. Miner* (1885) 25 Fed. 533.

¹³ *Killian v. Ebbinghaus* (1884) 110 U. S. 568, 572, 28 L. ed. 246, 248.

¹⁴ *Robinson v. Brast* (1906) 149 Fed. 151, 79 C. C. A. 19.

¹⁵ *Killian v. Ebbinghaus* (1884) 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. 232.

¹⁶ 3 Eq. Pom. Jur. 1325.

ity, of ten thousand dollars, less any sum that might be then due upon the policy for unpaid premiums. Upon filing a bill of interpleader the company deducted from the face of the policy the amount of a semi-annual premium which according to the terms of the policy became collectible at the maturity of the policy. The right of the company to retain this premium was questioned by the claimants but without any plausible ground. It was held that the retention of this premium by the company and the consequent controversy over it did not make the company so far interested in the subject-matter as to destroy the character of the suit as a pure bill of interpleader. And the plaintiff was allowed his costs and attorney's fee. If the plaintiff could be said to have any interest in the subject-matter at all, it was too remote to be seriously considered.¹⁷

§ 2242. Plaintiff Must Not Be Independently Liable to Either Claimant.

4. If the person who files the bill of interpleader and seeks to force the different claimants to litigate is under distinct obligation to each or either of them, as for instance, by making separate contracts with them or either of them in respect to the particular subject-matter, the bill of interpleader will not lie, because the claimants have distinct and separate rights against the plaintiff. No case for an interpleader is made where the stakeholder or debtor has made an independent personal agreement with some of the claimants regarding the subject-matter claimed, so that he is under a liability to them beyond that which arises from the title to the subject-matter. If A has effectually bound himself by contract to recognize the right of B in a certain regard, or has estopped himself from denying the title of B, A cannot compel B to litigate his right with C in regard to the same right, title, or interest.

Standley v. Roberts (C. C. A.; 1894) 59 Fed. 836, 8 C. C. A. 305: A lessee who had voluntarily taken two independent leases of the same property from two rival claimants of the title brought the amount due under one of the leases into court and sought to compel the two lessors to interplead, his purpose being thereby to exonerate himself from the obligation to pay the two separate stipulated rents. It was held that the bill would not lie. Here there were two independent debts arising under independent leases, of different dates and different terms, payable to different lessors. The claimants did not claim the same debt from the party who sought to compel them to interplead. The lessee had clearly estopped himself from questioning the right of either.

§ 2243. Bill in Nature of Bill of Interpleader.

Though a party who asserts a substantial interest in the fund or property in controversy cannot file a bill to compel other claimants to interplead concerning the same, it is often allowable for a person so

¹⁷ The suggestion made in court below (1901) 115 Fed. 357; McNamara v. to the contrary was overruled on this Provident Sav. etc. Co. (C. C. A.; 1902) point. Provident Sav. etc. Soc. v. Loeb 114 Fed. 910, 52 C. C. A. 530.

situated to file a bill in the nature of a bill of interpleader,¹⁸ in which suit he can have all the substantial benefits of a suit of interpleader, except in respect of his liability to be held for costs, and he may obtain affirmative relief, if he appears to be entitled to it.

1. *Pusey & Jones Co. v. Miller* (1894) 61 Fed. 401: The distinction between the technical bill of interpleader and the bill in the nature of a bill of interpleader was stated thus: "The purpose of a bill of interpleader is to compel the claimants of the same thing, debt, or duty from the party liable therefor, to litigate their respective claims between themselves; the party liable being under no independent liability to any of the claimants, and being merely in the position of a stakeholder, without interest in the matter himself. A bill in the nature of an interpleader lies by a party in interest to ascertain and establish his own rights, when there are other conflicting rights between third persons; as where a mortgagor wishes to redeem a mortgaged estate, and there are conflicting claims between third persons as to their title to the mortgage money, he may bring them before the court to ascertain their rights, and to have a decree for redemption, and to make a secure payment to the party entitled to the money. By the one bill the plaintiff seeks protection from rival claimants and a multiplicity of suits. By the other, he seeks relief, as well as protection."

2. *Butler v. Coleman* (1888) 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. 718: This case is an illustration of a bill in the nature of a bill of interpleader filed against the stakeholder instead of by him. A bank receiver, finding certain securities of the bank tied up to indemnify parties who had become sureties on bonds given by the bank to dissolve attachments sued out against it, filed a bill against the attaching creditors and the sureties on the bond. He alleged that the bonds were invalid, that the sureties were therefore not liable to any extent on the bonds, and that consequently he was entitled to the possession of the securities held by them for indemnification. In holding that the suit was a proper one for equitable cognizance, the court said: "The sureties are in a sense stakeholders. They do not claim the securities unless they are liable on the bonds, and the suit, although not brought by them, is in the nature of an interpleader to save them 'from the vexation of two proceedings on a matter which may be settled in a single suit.'"

The bill in the nature of an interpleader cannot be used as a mere device for getting into the court of equity on a purely legal cause of action. Such a bill cannot, for instance, be used as a substitute for an ejectment suit.¹⁹

Formalities Incident to Bill of Interpleader.

§ 2244. Contents of Bill.

The bill of interpleader should set forth in a terse and accurate way the conditions that give rise to the equity of interpleader. To

¹⁸ *Groves v. Sentell* (1894) 153 U. S. 465, 38 L. ed. 785, 14 Sup. Ct. 898; ¹⁹ *Killian v. Ebbinghaus* (1884) 110 U. S. 568, 28 L. ed. 240, 4 Sup. Ct. 232. *Provident Sav. Life Assur. Soc. v. Loeb* (1901) 115 Fed. 357.

this end, the debt, duty, or other thing for which the defendants are rival claimants should be described, and the general nature of their respective claims or interests should be stated. It should be made to appear that each of the defendants is setting up an exclusive claim to the debt, duty, or other thing; and if either or both of the defendants have made any demand, served any notice, made any threats of suit, or brought any suit, these facts should be set forth.²⁰ The plaintiff should then show that he himself has no interest in and makes no claim to the debt, duty, or other thing, and that he is willing to pay or deliver it to such person as may appear to be lawfully entitled thereto.²¹

The plaintiff must show that he is a mere stakeholder, having no personal interest in the controversy; and he must show that all of the parties defendant have at least a colorable right or claim upon the property, such as will entitle them to interplead. If the plaintiff shows in his bill that any one of the several defendants is clearly entitled to the debt or duty to the exclusion of the others, the suit cannot be maintained.²² Where it appears from the allegations of the bill that the claim of one of the defendants (there being only two) is such that it cannot be sustained on either legal or equitable grounds, there is no cause of interpleader and the bill is demurrable.²³ The bill is equally defective if it admits or shows that both of two claimants are entitled to the thing or duty that is the subject of the suit.²⁴

§ 2245. Offer to Bring Fund into Court.

The plaintiff in a bill of interpleader should offer to bring the fund or property in dispute into court. But a bill is not demurrable for failure to contain such an offer. However, it is necessary that the plaintiff should actually pay the money into court before taking any steps in the cause, if the offer is not properly made in the bill. If the claim is for goods, the plaintiff should offer to surrender the same to the court or its receiver; and it is not sufficient to offer to bring the value of the goods into court.²⁵

²⁰ Gibson, *Suits in Chan.* (2d ed.) 1111.

²¹ Killian v. Ebbinghaus (1884) 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. 232.

²² 2 Barb. Ch. Pr. 121.

²³ In *Pusey & Jones Co. v. Miller* (1894) 61 Fed. 401, one of the parties defendant to a bill of interpleader was alleged to claim an interest in the subject-matter of the suit by virtue of a partnership that had existed between

²⁴ 2 Barb. Ch. Pr. 121.
²⁵ 2 Barb. Ch. Pr. 122.

§ 2246. Prayer of Bill.

The prayer of the bill is that the defendants may interplead, so that the court may adjudge to whom the money or property belongs; and that the plaintiff may be indemnified. If any suit at law has been brought against the plaintiff, the bill may pray for an injunction to restrain the action until the right is determined. Usually the money must be brought into court before the court will grant such an injunction.²⁶ The bill must not seek affirmative relief against either of the defendants.²⁷

§ 2247. Affidavit of Noncollusion.

Every bill of interpleader should be accompanied by an affidavit of non-collusion, showing that there is no collusion between the plaintiff and any of the other parties. The want of this affidavit is a good ground of demurrer; but where non-collusion is alleged in the bill itself, and the bill is sworn to, no separate affidavit can be considered necessary.²⁸

§ 2248. Proceedings on Bill of Interpleader.

The proceedings in the interpleader suit are conducted in general conformity with the practice in other suits. If the bill is insufficient, the defendants may demur; and if either of the defendants denies the allegations of the bill in an answer, or sets up distinct facts in bar of the suit, the plaintiff must reply and close the proof in the usual manner before the cause can be heard. If the defendants admit the facts stated in the bill, on which the right to file the bill rests, and set up no new facts against the plaintiff, the latter may merely file his replication and set the cause down for a decree to interplead, without waiting until any proof is taken as between the defendants.²⁹

§ 2249. Pleadings of Codefendants—Cross Bill.

In a suit of interpleader the defendant claimants may assert their interests in the property or fund in controversy in their respective answers to the bill of interpleader; and as the title or right of either may be established by the proof, it will be so decreed. A regular cross bill is not essential as between the defendants, unless some special affirmative relief is desired by one as against some one or

²⁶ 2 Barb. Ch. Pr. 122.

²⁸ Gibson, *Suits in Chan.* (2d ed.)

²⁷ Killian v. Ebbinghaus (1884) 110 U.S. 1111, 1112.

U. S. 568, 28 L. ed. 246, 4 Sup. Ct. 232. ²⁹ 2 Barb. Ch. Pr. 124.

more of the others.³⁰ However, a cross bill may be filed as between the co-defendants, if it is so desired.

§ 2250. Proceedings on Cross Bill among Defendants.

Where the different claimants to a fund, being defendants in the original bill of interpleader, proceed to interplead with each other by the filing of formal cross bills, they thereupon assume the position, as regards each other, of plaintiff and defendant; and their pleadings are to be treated, construed, and given effect, according to the ordinary rules prevailing in equity. For instance, if one of the parties files a cross bill against his co-defendant, but does not waive the oath, the answer of this co-defendant, being put in under oath, is to be given the usual weight attributed to sworn answers, and its responsive allegations cannot be overcome except by more proof than that supplied by a single witness.³¹

§ 2251. Decree of Interpleader.

The ordinary decree of interpleader is of a preliminary nature, and may be obtained before the cause is ready for final hearing as between the defendants. Upon granting an order of interpleader, the court merely decides that the bill is rightly filed, and dismisses the plaintiff with his costs up to that time. If necessary, the decree will direct an issue or a reference to ascertain the rights of the defendants to the fund or property in controversy. There must be a decree on the bill of interpleader, in order to sustain the further proceedings; but a decree that the bill is properly filed is the only decree that the plaintiff is entitled to, as relief cannot be granted in his favor.³²

§ 2252. Final Decree as between Codefendants.

If the cause is ready for a hearing as between the defendants, as well as between them and the plaintiff, at the time it is brought on for hearing on the interpleader, the court can settle the conflicting claims of the defendants and make a final decree at such hearing.³³

If one defendant and claimant in an interpleader suit establishes his title while another makes default or otherwise fails to establish his title, the court will decree payment of the fund to the former

³⁰ *McNamara v. Provident Sav. etc.* ³¹ 2 Barb. Ch. Pr. 125.
Soc. (C. C. A.; 1902) 114 Fed. 910, 52 ³² 2 Barb. Ch. Pr. 124.
C. C. A. 530.

³¹ *Penn Mut. Life Ins. Co. v. Union
Trust Co.* (1897) 83 Fed. 891.

and grant a perpetual injunction against the latter.³⁴ The defendant who permits a bill of interpleader to be taken as confessed against him thereby admits that as to him the bill was properly filed and that he has no just claim upon the fund.³⁵

A defendant and claimant in a bill of interpleader who fails to establish any right in himself to the fund is not entitled to an account from another defendant, who succeeds in establishing his claims, of the amount and origin of these claims.³⁶ A defendant who wholly fails to make out his own right has no cause to complain of the decree in favor of another.³⁷

§ 2253. Costs and Expenses of Suit.

The solicitor's fee and other costs of the disinterested stakeholder who files a technical bill of interpleader may be charged to the fund.³⁸ But it is not so in regard to the solicitor's fee of an interested party who files a bill in the nature of a bill of interpleader. Having an interest in the result of the litigation, the plaintiff must pay his solicitor's fee himself.³⁹

The plaintiff in a bill of interpleader is not entitled to costs where the bill is unnecessary; and it must appear that the bill was properly filed as against both defendants.⁴⁰

§ 2254. When Interest on Fund Not Chargeable to Claimant.

A claimant in an interpleader proceeding will not be charged with interest on the fund during the pendency of the interpleader, though the bond required of him by the order of interpleader covers this element, where his claim seems to have been urged in good faith and he has barely failed to make it good by a preponderance of the proof.⁴¹

³⁴ McNamara v. Provident Sav. Life Greenough (1881) 105 U. S. 535, 26 L. Assur. Soc. (C. C. A.; 1902) 114 Fed. ed. 1161.

³⁵ 2 Barb. Ch. Pr. 124.

³⁶ Spring v. South Carolina Ins. Co. (1823) 8 Wheat. 268, 5 L. ed. 614.

³⁷ McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.; 1902) 114 Fed. ed. 1161, 52 C. C. A. 530. In McNamara v. Provident Sav. etc. Soc. (C. C. A.; 1902) 114 Fed. 910, 52 C. C. A. 530, the fee of plaintiff's solicitor was allowed against the fund though in one aspect the bill was con-

³⁸ Spring v. South Carolina Ins. Co. (1823) 8 Wheat. 268, 5 L. ed. 614; Louisiana State Lottery Co. v. Clark (1883) 16 Fed. 20; McNamara v. Provident Sav. etc. Soc. (1902; C. C. A.) 114 Fed. 910, 52 C. C. A. 530. Compare Trustees v.

³⁹ Groves v. Sentell (1894) 153 U. S. 468, 38 L. ed. 785, 14 Sup. Ct. 898.

⁴⁰ 2 Barb. Ch. Pr. 125.

⁴¹ Buck v. Mason (C. C. A.; 1905) 135 Fed. 304, 68 C. C. A. 148.

*Interpleading as to Fund Already in Court.***§ 2255. Order Granted without Formal Bill of Interpleader.**

When a court finds itself having the custody of a fund to which there are several adverse claimants, it is proper to enter an order of interpleader, requiring the claimants to litigate their respective rights between or among themselves. The order should require the person most appropriately having the position of actor to file a bill or petition against the others. The pleadings should be in accordance with the rules of equity pleading and the practice to be followed should be in conformity, as nearly as may be, with practice followed in ordinary suits in equity. The order may require the plaintiff to comply with reasonable and proper conditions, as by giving bond for costs and for interest on the fund in case his claim is not established.⁴³

§ 2256. Orders in Nature of Orders of Interpleader.

If, upon entering a money decree, the defendant suggests to the court that he has been served with notices of attachment and assignment and that in consequence it would be unsafe for him to pay the money to the plaintiff of record, the court will allow him to pay it into the registry of the court and bring in the parties who claim the fund by attachment and assignment, in order that they may interplead with each other and the plaintiff of record.⁴³

In any creditor's suit a party defendant who does not dispute the existence of the indebtedness may be allowed, if he desires to do so, to pay the debt into court, whereupon his liability in respect to the debt is discharged and the suit proceeds, as regards the other parties, as a suit of interpleader.⁴⁴

Intervention proceedings in receivership cause and other situations where intervention is allowable are analogous to practice of interpleading.⁴⁵

⁴³ *Buck v. Mason* (C. C. A.; 1905) 135 Fed. 304, 68 C. C. A. 148. ⁴⁴ *Aetna Nat. Bank v. United States Life Ins. Co.* (1885) 25 Fed. 531.

⁴³ *Mundy v. Louisville etc. R. Co.* ⁴⁵ *Farmers' etc. Co. v. Toledo etc. R. Co.* (C. C. A.; 1895) 67 Fed. 633, 14 C. C. Co. (1890) 43 Fed. 223. A. 56.

CHAPTER LV.

NE EXEAT.

General Principles Governing Use of Writ.

- § 2257. Function and Nature of Writ.
- 2258. Issuance of Ne Exeat from Federal Court.
- 2259. Authority of District Judge to Issue Writ.
- 2260. Use of Ne Exeat in Bankrupt Proceedings.
- 2261. Commencement of Suit as Prerequisite of Issuance of Writ.
- 2262. Against Whom Ne Exeat May Issue.
- 2263. Writ Available against Citizen of Foreign State.
- 2264. Nature of Claim on Which Writ May Issue.
- 2265. Writ Issuable if Equity Court Has Jurisdiction.
- 2266. Claim Must Be Liquidated and Must Be Due.
- 2267. Prior Decree.
- 2268. Discretion of Court as to Granting of Writ.

Formalities Incident to Use of Writ.

- 2269. Application for Ne Exeat.
- 2270. Special Prayer for Writ.
- 2271. Affidavit in Support of Application.
- 2272. Showing of Intention to Leave United States.
- 2273. Showing as to Nature of Claim Sued on.
- 2274. Order Granting or Refusing Writ.
- 2275. Order Limiting Time of Operation of Writ.
- 2276. Form of Writ.
- 2277. Writ Restrains Departure from Jurisdiction.
- 2278. Execution of Writ—Giving Security.
- 2279. Form of Bond—Performance.
- 2280. Application for Discharge of Writ.
- 2281. Grounds of Discharge on Merits.
- 2282. Proceedings Incident to Discharge of Writ.

General Principles Governing Use of Writ.

§ 2257. Function and Nature of Writ.

The *ne exeat* is a writ that issues to restrain a person from going beyond the confines of the country, or more specially, from going beyond the limits of the jurisdiction of the court, until he has satisfied the plaintiff's claim or has given bond for the satisfaction of the decree of the court.¹ It is a writ in familiar use in equity against

¹ 3 Dan. Ch. Pr. 375.

any one who, "designing to avoid the justice and equity of the court," is about to go beyond the sea.²

The writ is of a high prerogative nature and was originally applicable to purposes of state, but it was afterwards extended so as to be used by the court of equity in civil disputes. Ordinance 89, of Lord Bacon, after recognizing the use of the writ for purposes of state, provides that it may also be issued by the court of chancery "according to the practice of long time used, in case of interlopers in trade, great bankrupts, in whose estate many subjects are interested, or other cases that concern multitudes of the king's subjects." The writ is one of the extraordinary processes of courts of equity, and it is as much a writ of right as any other process used in the administration of justice. The right to issue it is inherent in the court, and it will be granted whenever a proper case is presented.³ The abolition of imprisonment for debt has not deprived the court of the power to issue the writ of *ne exeat*.⁴

Though the writ is primarily a personal writ and is intended to enable the court to retain jurisdiction over the defendant, the removal of property by the defendant may be restrained as an incident to the granting of the writ.⁵

§ 2258. Issuance of *Ne Exeat* from Federal Court.

The authority of the federal courts to issue the writ of *ne exeat* is primarily based upon their inherent jurisdiction as courts of equity; but by statute they have been specially endowed with the power to issue all writs not specifically provided for by statute that may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.⁶ The power to issue the writ and the conditions under which it shall be granted are more particularly defined in the following provision.

Revised Statutes, section 717: Writs of *ne exeat* may be granted by any justice of the supreme court, in cases where they might be granted by the supreme court; and by any circuit justice or circuit judge, in cases where they might be granted by the circuit court of which he is judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

§ 2259. Authority of District Judge to Issue Writ.

The first part of this statute is not to be understood as limiting the power of any of the federal courts, when sitting as courts, to issue

² *In re Lipke* (1900) 98 Fed. 971.

³ 3 Dan. Ch. Pr. 375; 1 Barb. Ch. Pr. Cranch, C. C. 352, 647.

⁵ *Patterson v. McLaughlin* (1906) 1

⁶ 716 R. S.

⁴ Gibson, *Suits in Chan.* (2d ed.) 864.

the writ of *ne exeat*. Its purpose apparently is to put beyond civil the authority of a single justice of a supreme court, or of a circuit justice, or circuit judge, to issue the writ by an order granted at chambers. Accordingly the statute is not to be construed as denying the power of a district court, sitting as a court of equity, to issue the writ. Nor is it to be understood as prohibiting a district judge from issuing the writ when he sits in his capacity as a circuit court. At an early day it was considered that a district judge, sitting as such, had no authority to issue the writ;⁷ and it has even been doubted whether he can properly do so when sitting as judge of a circuit court.⁸ But it is now held that a district judge sitting in the district court as a court of equity has authority to issue the writ;⁹ and he can certainly do so when sitting as judge of a circuit court.

§ 2260. Use of Ne Exeat in Bankrupt Proceedings.

The district court exercising jurisdiction in bankruptcy proceedings has authority to issue the writ of *ne exeat*.¹⁰ In these proceedings, the writ is adapted to supplement the statutory warrant of arrest. The warrant of arrest is limited to a detention of the bankrupt for the purpose of examination after the adjudication of bankruptcy, and for his appearance, from time to time, for that purpose, not exceeding in all ten days; also to secure his obedience to all lawful orders made in reference to his examination. The issue of the warrant is further limited to a period of one month after the qualification of the trustee. The limitations upon the use of the warrant often render the use of the writ of *ne exeat* desirable and even necessary in administering bankrupt proceedings.¹¹

§ 2261. Commencement of Suit as Prerequisite of Issuance of Writ.

In the practice of the English chancery the writ would only be granted upon a bill being filed;¹² and section 717 of the Revised Statutes declares that the writ shall not be granted unless a suit in equity is commenced. This requirement is complied with by the filing of a bill and, *a fortiori*, by the additional step of serving the subpoena.¹³ But it is not necessary that the subpoena should be

⁷ *Gernoñ v. Boecaline* (1807) 2 Wash. the writ with leave to the defendant to move to quash the same. C. C. 130.

⁸ *In Leewenstein v. Biernbaum* (1880) Fed. Cas. No. 8,461a, a district judge sitting as a circuit court queried his right to issue a writ of *ne exeat*; but acting upon the precedent contained in *Union Mut. L. Ins. Co. v. Kellogg* (1878) Fed. Cas. No. 14,373, he granted Eq. Prac. Vol. II.—84.

⁹ *Lewis v. Shainwald* (1881) 48 Fed. 500.

¹⁰ *In re Cohen* (1905) 136 Fed. 999.

¹¹ *In re Lipke* (1900) 98 Fed. 971.

¹² *In re Dan. Ch. Pr.* 387.

¹³ *Loewenstein v. Biernbaum* (1880) Fed. Cas. No. 8,461a.

actually served upon the party before or simultaneously with the service of the *ne exeat*.¹⁴ The commencement of bankruptcy proceedings in a district court is the commencement of a suit in equity within the meaning of the rule allowing the issuance of a *ne exeat*.¹⁵

§ 2262. Against Whom Ne Exeat May Issue.

A *ne exeat* lies only against the debtor, or person legally or equitably liable to the plaintiff. Accordingly, it will not lie against a garnishee, since the garnishee is not personally liable to the creditor.¹⁶ But a *ne exeat* may issue against an executor or administrator, since he becomes personally liable in his representative capacity. He is a debtor to the extent of assets.¹⁷

§ 2263. Writ Available against Citizen of Foreign State.

A doubt has been expressed on the question whether a writ of *ne exeat* can be issued against a citizen or subject of a foreign state. This doubt arises from the consideration that the writ is supposed to have been originally founded upon the right of the sovereign to demand the services of every subject.¹⁸ But whatever may have been the origin of the power to issue the writ, it is certainly now exercised as one of the incidents of equitable jurisdiction and as a means of effectuating the administration of justice. Accordingly there is no good reason why the writ cannot be issued against a foreign citizen or subject of a foreign state.¹⁹ In the English chancery the writ was commonly issued against persons living in Scotland, Ireland, or in the colonies, or in other parts of the British dominions;²⁰ and it could also be obtained by a British subject against a citizen of a foreign state.²¹ If such a person, being subject to suit in England, ventured within the bounds of that country, the writ could issue against him, though he came for a particular purpose only and intended to return immediately.²²

¹⁴ Georgia Lumber Co. v. Bissell Great Britain, did not express any doubt (1841) 9 Paige 225, as to his power to grant the writ against

¹⁵ *In re Lipke* (1900) 98 Fed. 970, the defendant. But the writ was denied

¹⁶ Patterson v. Bowie (1807) 1 Cranch, on equitable considerations. C. C. 425, Fed. Cas. No. 10,825. ¹⁸ 3 Dan. Ch. Pr. 383.

¹⁷ Patterson v. McLaughlin (1806) 1 Cranch, C. C. 352, Fed. Cas. No. 10,828. ²¹ The writ was granted in the English

¹⁸ Patterson v. McLaughlin (1806) 1 Cranch, C. C. 352. subject against a Russian who resided in St. Petersburg but happened to be in

¹⁹ In Harrison v. Graham (1901) 110 Fed. 896, Putnam, Circuit Judge, in considering whether the writ should be issued against a subject of the King of

England for a temporary purpose. 1 Smith, Ch. Pr. (2d ed.) 578.

²² 3 Dan. Ch. Pr. 383.

§ 2264. Nature of Claim on Which Writ May Issue.

Before a writ of *ne exeat* can be issued, it must appear that the claim or cause of action stated in the bill is of equitable cognizance; or, as is sometimes said, the debt must be an equitable debt.²³ "Wherever a party has a claim against another which he can only enforce in a court of equity, the court will issue the writ."²⁴ If the claim is for a simple debt cognizable at law, and no other ground of equitable jurisdiction exists, the plaintiff will of course be compelled to resort to a court of law.²⁵

§ 2265. Writ Issuable if Equity Court Has Jurisdiction.

A *ne exeat* can be granted by the court of equity in any case over which the court of equity has jurisdiction, although its jurisdiction is concurrent with that of the court of law.²⁶ It is only where the plaintiff has an adequate remedy at law and the jurisdiction of the court of equity is excluded on this ground, that the court of equity will refuse to grant the writ.

The writ of *ne exeat* can be obtained by the vendor in a suit for specific performance to restrain the vendee from going abroad until he has given security for the purchase money. Although in such cases the vendor may have a right to proceed at law for the recovery of his purchase money, yet as equity has concurrent jurisdiction to compel specific performance, the writ may be issued as an incident to the exercise of this jurisdiction.²⁷

The court will also grant the writ upon a bill to recover on a lost bond, though by the practice of the court of law the plaintiff can now declare upon such instrument.²⁸

²³ *Graham v. Stucken* (1857) 4 Blatchf. 50, Fed. Cas. No. 5,877.

The only exception in the English chancery to the rule requiring that the demand should be equitable was found in the case of alimony decreed by a spiritual court. Here, as the spiritual court could not arrest a party and take bail, the court of equity lent its assistance by granting a writ of *ne exeat*. 3 Dan. Ch. Pr. 376.

²⁴ 3 Dan. Ch. Pr. 376.

²⁵ See *McKenzie v. Cowing* (1834) 4 Cranch, C. C. 479, Fed. Cas. No. 8,856.

One of the reasons formerly assigned for the refusal of the court of equity to

grant the writ of *ne exeat* upon a legal demand was that the plaintiff could sue

the defendant at law and have him arrested in those proceedings and oblige him to give bail. 3 Dan. Ch. Pr. 375. The right to arrest and commit persons to jail or require bail in civil causes has been abolished, but the courts of equity have not for this reason extended their jurisdiction so as to permit of the use of the writ in cases cognizable at law.

²⁶ 3 Dan. Ch. Pr. 378.

²⁷ 3 Dan. Ch. Pr. 378.

²⁸ 3 Dan. Ch. Pr. 378.

§ 2266. Claim Must Be Liquidated and Must Be Due.

In order to justify the issuance of the writ of *ne exeat*, the claim or demand sued on must be a debt or liquidated pecuniary claim. It must either be certain or capable of being reduced to certainty; and it must be due.²⁹ An unliquidated claim for damages, not yet reduced to judgment, constitutes no foundation for the writ. As Lord Eldon once observed, "the writ goes only where the debt is sworn to. If damages only are to be recovered at law or in equity, that will not do." Again, said he, the writ is only applied to that which is really a debt, and not to that which may become a debt when a recovery in damages shall have ascertained what is due." Accordingly, it was held by him that a writ of *ne exeat* should not issue upon a demand for damages for loss occasioned by a fraudulent delay on the part of a consignee to sell goods intrusted to him.³⁰

Graham v. Stucken (1857) 4 Blatchf. 50, Fed. Cas. No. 5,677: A claim was held to be insufficient to justify the issuance of the writ of *ne exeat* upon these facts: The plaintiff had, as he alleged, executed bills of sale of two ships to the defendant to secure a usurious loan of money, the transaction being put into the form of a sale to hide the usury. The defendant had taken possession of the ships. The transaction being void for usury under the law of that state, the plaintiff sought to have the bills of sale declared void and the ships returned to him, or in default of such return, a decree for their value. The plaintiff also asked for an accounting of the earnings of the vessels. It was held that this was not a claim for a liquidated money demand such as would justify issuance of the writ.

§ 2267. Prior Decree.

A writ of *ne exeat* may be issued in a suit upon a prior judgment or decree where additional affirmative relief is sought. But it has been refused where the only relief sought was a renewal of the judgment to prevent the bar of the statute of limitations from attaching.³¹

§ 2268. Discretion of Court as to Granting of Writ.

Like all other special writs issued by courts of equity in the exercise of equitable jurisdiction, the writ of *ne exeat* is an equitable writ; and therefore it cannot be granted without some regard to the

²⁹ 3 Dan. Ch. Pr. 382.

³⁰ *Flack v. Holm* (1820) 1 Jac. & W. 404. deposited the whole in a bank, a *ne exeat*, it was said, could not be issued (?).

³¹ *McKenzie v. Cowing* (1834) 4 Cranch, C. C. 479, Fed. Cas. No. 8,856. Where a clerk embezzled property and money belonging to his employer and, after converting the property into money, 842. *Shainwald v. Lewis* (1889) 46 Fed.

relative mischiefs that the refusal or allowance of the writ would bring upon the respective parties. It should never be issued unless the cause of action plainly appears to be well founded and the circumstances are such as to call for the remedy. The mere fact that the court has jurisdiction and that the plaintiff may go away is not always enough. The circumstance that the recovery may be nominal only is to be considered as making against the exercise of the discretion of issuing such writ.³²

Harrison v. Graham (1901) 110 Fed. 896: Putnam, Circuit Judge, refused to grant a writ of *ne exeat* under these circumstances: The plaintiff, a citizen of New York state, brought suit in equity in the circuit court of the district of Maine against a subject of Great Britain who lived in Montreal but who was temporarily sojourning in Maine where process was served. It appeared that the plaintiff, if so disposed, could have sued the defendant in the Canadian courts with as much convenience as in the federal court in Maine; and also, that any decree granted in the federal court where suit had been brought would be respected and enforced in Canada. It was held that a denial of the writ would not cause the plaintiff as much inconvenience as the granting of it would probably cause the defendant, and it was accordingly refused.

A writ of *ne exeat* will not be granted where a similar writ has been granted in another suit on the same debt, and the defendant placed under bond not to leave the jurisdiction; especially where the prior writ has been in force for a long period, and the plaintiff has been lacking in diligence in the prosecution of the former suit. The writ of *ne exeat* is in its nature a temporary remedy; and it is not intended to operate as a perpetual restraint upon the defendant's freedom of movement.³³

Formalities Incident to Use of Writ.

§ 2269. Application for Ne Exeat.

The writ of *ne exeat* is obtained in precisely the same way an injunction is obtained, that is, upon a prayer therefor in the bill and application to the court, based on sworn petition or affidavit. It may be applied for at any stage of the suit after the filing of the bill.³⁴

The application is usually made *ex parte*; and no notice of the

³² *Loewenstein v. Biernbaum* (1880) defendant to be harassed with a *ne exeat* where he has already been held in Fed. Cas. No. 8,461a.

³³ *Shainwald v. Lewis* (1889) 46 Fed. bail in a court of law on the same 838. demand. 3 Dan, Ch. Pr. 381.

A court of equity will not permit a ³⁴ 1 Barb. Ch. Pr. 648.

application for the writ need be given to the defendant, since the service of notice might have the result of giving the defendant an opportunity to escape from the jurisdiction before the order could become effective.³⁵ The application may be made in open court or it may be made to a supreme court judge, a circuit justice, or a circuit judge at chambers.³⁶

§ 2270. Special Prayer for Writ.

Under the original practice of the equity court, the writ of *ne exeat* could be issued though there was no special prayer therefor in the bill. It was sufficient if the facts alleged in the bill and properly established showed a proper case for the writ. It could be granted under the prayer for general relief; or it could be specially applied for by petition showing the facts entitling the petitioner to such writ. It could be applied for and granted either before or after the decree. Equity rule 21 has modified the practice somewhat as regards the necessity for a special prayer, inasmuch as this rule provides that if a writ of *ne exeat* is required pending the suit it shall be specially asked for. But this provision applies only where the writ is asked for "pending the suit." It has no application where the writ is granted after decree. In such cases the original practice prevails.³⁷ Nor can this rule be considered applicable where the exigency requiring the issuance of the writ arises after the bill is filed and during the progress of the suit. For instance, if a defendant should first threaten to leave the country or begin to make preparations for departure after the filing of the bill and while the suit is pending, an application for the writ could be made without its having been prayed for in the bill, and without any amendment to insert such a prayer. This is in conformity with common sense and in conformity with the practice of the English court of chancery.³⁸

§ 2271. Affidavit in Support of Application.

The application for the writ of *ne exeat* must be supported by a sworn petition or by affidavit, or affidavits, setting forth a sufficient

³⁵ Loewenstein v. Biernbaum (1880) made immediately on the filing of the Fed. Cas. No. 8,461a. bill, it is usual to pray it. It frequently,

³⁶ 717 R. S.

³⁷ Lewis v. Shainwald (1881) 48 Fed. intention to go abroad arises, or is first 492.

³⁸ "It is not necessary to entitle a plaintiff to a writ of *ne exeat* that it should be prayed by the bill, although where the application is intended to be

ground to justify the issuance of the writ. The affidavit should be positive, and if based on information and belief only, is not sufficient.³⁹ The affidavit is usually made by the party himself, but it is not absolutely necessary that it should be made by him. If a party is under legal disability, the affidavit in his behalf may be made by his next friend, guardian, committee, or other person having knowledge of the facts.⁴⁰

The affidavit should be entitled in the suit; and hence it should not be made before the bill is filed.⁴¹ The affidavit on which an application for the writ is based may be amended if it is defective in any of the particulars indicated above.⁴²

§ 2272. Showing of Intention to Leave United States.

The affidavit on which the application is founded must show that the defendant intends going abroad, or that he designs "quickly to depart from the United States." It is not sufficient to show that it is the intention of the defendant to withdraw from the district.⁴³ The affidavit should be positive as to the defendant's intention to go abroad, or declarations or acts evincing such an intention must be shown.⁴⁴ But any proof is sufficient if it shows to the satisfaction of the court or judge granting the writ that the defendant has such an intention.⁴⁵

Where, on an application for a writ of *ne exeat*, it was admitted that the defendant was about to depart from the country and that to this end he was offering his house and furniture for sale, it was held that the showing of an intention quickly to depart was made out, and that the writ might issue notwithstanding the defendant insisted that he expected to return and that the change of residence was only temporary. But the defendant did not state definitely when he intended to return.⁴⁶

§ 2273. Showing as to Nature of Claim Sued on.

An affidavit in a suit on a debt or for an accounting is not sufficient to justify the issuance of a writ of *ne exeat* unless it positively states the existence of a debt for a certain sum or that according to the plaintiff's information and belief a certain balance on account is

³⁹ 3 Dan. Ch. Pr. 389.

Fed. Cas. No. 8,461a; *Shainwald v. Lewis* (1889) 46 Fed. 839.

⁴⁰ See 3 Dan. Ch. Pr. 389.

⁴⁴ 3 Dan. Ch. Pr. 390.

⁴¹ 1 Barb. Ch. Pr. 649.

⁴² *Gernon v. Boecaline* (1807) 2 Wash.

⁴⁵ 717 R. S.

C. C. 130, Fed. Cas. No. 5,367.

⁴⁶ *Graham v. Stucken* (1857) 4

⁴³ *Loewenstein v. Biernbaum* (1880) Blatchf. 50, Fed. Cas. No. 5,677.

due. An affidavit is defective where it merely alleges the existence of a just demand against the defendant.⁴⁷

§ 2274. Order Granting or Refusing Writ.

If the court or judge to whom the application is made sees fit to grant the writ, he indorses his order or fiat to that effect on the bill or application, and the writ issues in substantially the same way as a writ of injunction would issue. If he refuses the writ, this fact will be indorsed. In either event the papers are transmitted to the clerk of the court, and if the application has been granted, the writ is issued by him.⁴⁸ Upon granting the writ, the court may make any special order governing the issuance of the writ that may be appropriate under the particular circumstances, as by indicating the sum for which the defendant must be required to give security.

§ 2275. Order Limiting Time of Operation of Writ.

It is usually proper to insert in the order granting a writ of *ne exeat* a provision to the effect that the writ shall be effective until the satisfaction of the decree or until further order of the court. But an order granting a writ of *ne exeat* will not be reversed merely because it fails to place a limit upon the time during which the writ is to be effective. The court has power to control the writ at all times and presumably will dissolve it when its purpose is accomplished or upon a sufficient showing that it ought to be dissolved.⁴⁹

§ 2276. Form of Writ.

The writ is directed to the marshal of the district, and authorizes him to arrest the defendant and compel him to give sufficient bail, or security, that he will not go or attempt to go into parts beyond the seas or beyond the jurisdiction of the court, without leave of the court; and in case the defendant refuses to give such bail or security, the marshal is commanded to commit him and hold him in custody until the further order of the court.⁵⁰

⁴⁷ Gernon v. Boecaline (1807) 2 Wash. the seal of this court, to restrain the C. C. 130, Fed. Cas. No. 5,367.

⁴⁸ 3 Dan. Ch. Pr. 393; Gibson, Suits in Chan. (2d ed.) 867.

⁴⁹ Lewis v. Shainwald (1881) 48 Fed. 500. The order ran as follows: "It is further ordered, adjudged, and decreed that the writ of ne exeat of the United States of America issue out of and under

⁵⁰ 3 Dan. Ch. Pr. 393.

§ 2277. Writ Restrains Departure from Jurisdiction.

Though the writ of *ne exeat* can only be issued upon a showing that the defendant designs quickly to depart from the United States,⁵¹ yet when the court actually comes to issue the writ, it will restrain the defendant from departing from the particular jurisdiction of that court.⁵² This is a seeming inconsistency, but it is probably based on the idea that unless the defendant is restrained from going beyond the jurisdiction of the court, the writ can be given no effect whatever.

§ 2278. Execution of Writ—Giving Security.

The writ of *ne exeat* is executed in all respects like an ordinary *capias*, and bond is taken in the same way. If the marshal accepts security, he should forthwith return the same into court, together with the writ. The defendant may, if arrested, give bond at any time to the marshal and be discharged; or if the court is in session, he may, by leave of the court, give his bond to the clerk, or enter into a recognizance on the minutes.⁵³ Instead of taking bail, the marshal may accept a deposit of the amount indorsed on the writ.⁵⁴

When issued, the writ is indorsed with the required amount of security, which should cover the sum really due, and costs.⁵⁵ Where the writ has been indorsed for a larger sum than is due, the court may subsequently make an order that the security shall be for so much only as is really due, without quashing the writ.⁵⁶

§ 2279. Form of Bond—Performance.

The usual condition of the bond is that the defendant will not depart from the jurisdiction of the court and that he will obey its lawful orders and decrees.⁵⁷

The obligation of the bond is complied with where the defendant in the *ne exeat* remains within the jurisdiction according to the condition of the bond, and his sureties are not liable on the bond. In no

⁵¹ 717 R. S.; *Loewenstein v. Biernbaum* (1880) Fed. Cas. No. 8,461a. ⁵⁴ 3 Dan. Ch. Pr. 395. See 3 Dan. Ch. Pr. 304.

⁵² *Lewis v. Shainwald* (1881) 48 Fed. 550; *In re Cohen* (1905) 136 Fed. 999; *In re Kellogg* (1878) Fed. Cas. No. 14,373, the Union Mut. Life Ins. Co. v. Kellogg (as amount of the bond in the writ of *ne* stated in *Loewenstein v. Biernbaum* was fixed at the sum alleged in (1880) Fed. Cas. No. 8,461a); *Patterson v. McLaughlin* (1806) Fed. Cas. No. 10,828; 1 Cranch, U. C. 352.

⁵³ Gibson, *Suits in Chan.* (2d ed.) 808. ⁵⁶ 3 Dan. Ch. Pr. 394. ⁵⁷ *In re Lipke* (1900) 98 Fed. 970.

event are the sureties liable for a greater sum than that for which the court finally enters a decree in favor of the plaintiff.⁵⁸

§ 2280. Application for Discharge of Writ.

An application to discharge the writ may be made by the defendant either upon special motion or by petition, of which notice must be given to the plaintiff.⁵⁹ Where the writ has been irregularly granted, the defendant may move to quash or discharge it for the irregularity.⁶⁰

If the application is based upon irregularity, it may be made before answer, and may be supported by affidavit; but in ordinary cases, the defendant must answer before he can apply to discharge the writ, and he cannot be heard upon affidavit unless the writ was issued on a matter arising after the answer had been filed.⁶¹

§ 2281. Grounds of Discharge on Merits.

The court will discharge the writ upon merits whenever it appears that the plaintiff has no case, or no case justifying the issuance of the writ, or that the defendant is not going out of the jurisdiction. It will also discharge the writ upon the defendant's paying into court the sum claimed to be due.⁶² It may be stated generally that whatever would justify the dissolution of an injunction or the discharge of an attachment of property will justify the discharge of a *ne exeat*.⁶³

§ 2282. Proceedings Incident to Discharge of Writ.

When a *ne exeat* is discharged, the court will order that the bond given by the defendant be cancelled; and if the writ was improperly granted, an inquiry before the master may be directed to ascertain the damages sustained by the defendant. A decree for these damages, when ascertained, will be rendered against the plaintiff and against the sureties on the *ne exeat* bond given by him when the writ was issued.⁶⁴

⁵⁸ *Zantzinger v. Weightman* (1824) plaintiff falsely and maliciously procured a *ne exeat* to be issued and caused the penalty of the bond to be fixed at a sum largely in excess of the bail that

⁵⁹ 3 Dan. Ch. Pr. 396.

⁶⁰ *Gernon v. Boecaline* (1807) 2 Wash. C. C. 130.

⁶¹ 3 Dan. Ch. Pr. 397.

⁶² 3 Dan. Ch. Pr. 397.

⁶³ *Gibson, Suits in Chan.* (2d ed.) 868. *Zantzinger v. Weightman* (1824) 2 Cranch, C. C. 478, Fed. Cas. No. 18,202.

⁶⁴ *Gibson, Suits in Chan.* (2d ed.) 868. In an action on the case for that the

CHAPTER LVI.

INJUNCTIONS.

General Principles.

- § 2283. Injunctive Relief as Ground of Equitable Jurisdiction.
- 2284. Injunctions and Injunctional Orders.
- 2285. Authority of Federal Courts to Issue Writ.
- 2286. Practice Governed by Federal Law.
- 2287. Injunction Operates against Person.
- 2288. Prohibitory Injunction.
- 2289. Mandatory Injunction.
- 2290. Common Injunction.
- 2291. Special Injunction.
- 2292. Common and Special Injunctions in Federal Practice.
- 2293. Restraining Order.
- 2294. Preliminary Injunction.
- 2295. Final Injunction.
- 2296. Statute and Rule Governing Issuance of Injunctions.
- 2297. Injunction Granted by Supreme Court Justice.
- 2298. Injunction Granted by District Judge.
- 2299. Injunction Granted by Circuit Judge.
- 2300. Duration of Injunction Granted in Vacation.
- 2301. Effect of Injunction against Judgment at Law.

Preliminary Steps in Procuring Injunction.

- 2302. Injunction Grantable Only upon Suit Brought.
- 2303. Prayer for Issuance of Writ.
- 2304. Exceptions to Rule Requiring Special Prayer.
- 2305. Allegations of Injunction Bill.
- 2306. Allegations Must Be Specific.
- 2307. Statements Made on Information and Belief.
- 2308. No Injunction on Defective Bill.
- 2309. Verification of Bill.

Application for Temporary Restraining Order.

- 2310. Filing Bill—Application for Restraining Order.
- 2311. Bond to Indemnify Defendant.
- 2312. Considerations Affecting Exercise of Judicial Discretion.
- 2313. Validity of Order as Affected by Jurisdiction of Court.
- 2314. Limiting Duration of Restraining Order.
- 2315. Discharge of Restraining Order.

Application for Preliminary Injunction.

- § 2316. Motion for Interlocutory Injunction.
- 2317. Application after Proof Taken.
- 2318. Service of Notice.
- 2319. Reasonable Period of Notice.
- 2320. Service of Copy of Bill and Affidavits.

Hearing of Motion for Injunction.

- 2321. Mode of Proof Subject to Court's Control.
- 2322. Determining Whole Cause on Motion for Injunction.
- 2323. Plaintiff's Proofs.
- 2324. Use of Documents.
- 2325. Requisites and Scope of Plaintiff's Affidavits.
- 2326. Defendant's Case in Opposition to Motion.
- 2327. Sworn Answer Used as Affidavit by Defendant.
- 2328. Demurrer Not Overruled by Answer Used as Affidavit.
- 2329. Affidavits in Rebuttal Admissible Only by Leave of Court.
- 2330. Affidavits in Surrebuttal.
- 2331. Affidavits Taken after Expiration of Time Allowed.
- 2332. Weight of Affidavits and Other Proof.

Use of Affidavits to Contradict Answer.

- 2333. Affidavits Not Permitted under Former Practice.
- 2334. Exceptions to This Rule.
- 2335. Present Practice—Affidavits Admissible to Show Danger of Injury.

*General Principles.***§ 2283. Injunctive Relief as Ground of Equitable Jurisdiction.**

The subject of injunction, in its broadest extent, comprises a distinct head of equity jurisprudence; and full treatment of it would require a minute consideration of the various grounds upon which the jurisdiction to grant the writ of injunction will be exercised. For the purposes of the present treatise, the discussion will be limited to a consideration of the nature of the writ and of the methods by which it is procured and made effective in the federal courts. It is not desirable or practicable to undertake to define all the situations under which an injunction can be obtained. To do so would require a treatise in itself, and all that can be here attempted is to develop such points of procedure as are common to all situations requiring or justifying the use of the writ. It is sufficient to observe, in regard to the scope of the writ, that its use is commensurate with the jurisdiction of the court. An injunction can be had in any case over which the court may assume jurisdiction, provided only the situation is such that the use of the writ is adapted to the ends of justice in such

case; and it is not necessary that the jurisdiction of the court should arise out of other considerations than those upon which the title to the writ of injunction rests. The claim to injunctive relief is often alone sufficient to support the jurisdiction of the court; for as suggested above, injunction is a substantive head of equity as well as a writ or process of the court.

An assumption of jurisdiction for the purpose of granting an injunction justifies the court in granting complete relief in respect of the subject-matter affected by the injunction.¹

§ 2284. Injunctions and Injunctional Orders.

An injunction is a judicial order, or mandate, granted, made, or issued by a court of equity, requiring a party to do or refrain from doing some specified act. It has been defined as a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it considers contrary to equity and good conscience.² In its original and technical sense the term is to be understood as referring to the writ or process by which the court of equity makes its injunctive order or decree effective;³ but in a broader sense it includes all orders or decrees by which a party is commanded to do or to refrain from doing a particular act.

The distinction between the writ of injunction proper and an order or decree in the nature of an injunction is generally disregarded in practice; and injunctive orders, though not enforced by the writ of injunction, are commonly called injunctions.⁴ By the statutes of some of the states, the writ of injunction, considered as a mere process, has been entirely abolished; and in these jurisdictions an injunction has become merely a form of an order or decree, rather than a writ.⁵ But in the federal courts the writ or process of injunction is still used, in conformity with the ancient practice of courts of equity, for the purpose of enjoining or restraining a party in respect to the matters specified in the writ. When used as an interlocutory and conservative process, the injunction is called the "remedial writ of injunction." When the writ of injunction is used to carry into effect a final decree, it is known as the "judicial writ," because it

¹ *Dulaney v. Scudder* (C. C. A.; 1899) 94 Fed. 6, 36 C. C. A. 52. ⁵ *Andrews v. Love* (1891) 46 Kan. 264; *Boyd v. State* (1886) 19 Neb. 128;

² *Parsons v. Marye* (1885) 23 Fed. Methodist Churches v. Barker (1858) 18 121, *citing* *Jeremy Eq. Jur.* 307. N. Y. 463.

³ 10 Encyc. of Pl. & Pr. 876, 877.

⁴ *Ellis v. Commander* (1847) 1 Stroh. Eq. 188.

issues after the decree and is in the nature of a writ of execution of the decree.⁶

§ 2285. Authority of Federal Courts to Issue Writ.

The power of the federal courts of equity to issue the writ of injunction is not only inherent in them, but is amply secured by that provision of the statutes which authorizes the federal courts to issue all writs necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.⁷ However, one very important limitation upon the power of the federal courts to issue the injunction is found in a statutory provision declaring that the writ of injunction shall not be granted by any court of the United States to stay proceedings in a state court, except in cases where such injunction may be authorized by the bankrupt laws.⁸

The injunction is a due process of law. Consequently the power of a court of equity to grant injunctions is not affected by the constitutional provision relating to due process of law, even though in a particular case the court may disregard the rules of equity and justice in granting the injunction.⁹

§ 2286. Practice Governed by Federal Law.

The practice in the federal courts in regard to the granting of injunctions is governed exclusively by the federal laws and by the accepted equity practice of the federal courts.¹⁰

§ 2287. Injunction Operates against Person.

The writ of injunction is by far the most important and most characteristic of all the processes used by the court of chancery; and it is the principal instrument used by this court in the exercise of its administrative and protective jurisdiction. The process has been well termed "the right arm of the court of chancery."¹¹ It is based upon the power of the court of equity to act *in personam*, or directly upon the individual against whom the writ is directed.

§ 2288. Prohibitory Injunction.

As regards the nature of the act that is required to be done, injunctions are said to be either prohibitory or mandatory. Ordinarily, the

⁶ 1 Barb. Ch. Pr. 608.

⁷ 716 R. S.

⁸ 720 R. S. For cases bearing on the scope and application of this statute, see 4 Fed. Stat. Anno. 509-517.

⁹ Montana Co. v. St. Louis etc. Co. (1894) 152 U. S. 170, 38 L. ed. 400.

¹⁰ Payne v. Kansas etc. R. Co. (1891)

46 Fed. 546, 551.

¹¹ 1 Barb. Ch. Pr. 615.

injunction is merely preventive or prohibitory, that is, it commands the defendant to refrain from the doing of some injurious act; and it operates to restrain the commission or continuance of an act or series of acts that, if done, would result in injury to the party applying for the injunction. The prohibitory injunction contemplates the situation where a wrong is meditated, and its purpose is to prevent that act and preserve the existing status.¹²

§ 2289. Mandatory Injunction.

An injunction is said to be mandatory when it requires the defendant to do some affirmative act necessary to restore the subject-matter of the controversy to the situation it was in before the doing of the wrongful act complained of.¹³ A mandatory injunction is never granted unless very serious damage will ensue from withholding relief, and each case must of course depend on its own circumstances.¹⁴ Mandatory injunctions not infrequently form part of the final decree in equity causes, as where specific performance is decreed, and an affirmative act is necessary to carry the decree into effect; but the courts are very loath to grant a preliminary mandatory injunction prior to the final decree. They will, however, often accomplish indirectly that which they will not do directly; that is, instead of framing the order so as to command the doing of a positive act, they will so shape it as to prohibit the defendant from doing the reverse of what he is desired to do.¹⁵ Even then the jurisdiction is exercised with caution, and is confined to cases where the court of law would be unable to give adequate redress.¹⁶

§ 2290. Common Injunction.

As regards the conditions under which injunctions could be procured, a distinction was recognized in the English practice between what was called the common injunction and what was called the special injunction. The common injunction was issued only in suits brought to restrain an action at law or to enjoin the enforcement of a

¹² Northern Indiana R. Co. v. Michigan Cent. R. Co. (1853) 15 How. 243, Cas. 507; Westminster Brymbo etc. Co. 14 L. ed. 679; Lacassagne v. Chapuis v. Clayton (1866) 36 L. J. Ch. N. S. 476; Cherokee Nation v. Georgia (1831) 5 (1836) 8 Sim. 193; Rankin v. Huakiason Pet. 78, 8 L. ed. 53.

¹³ *In re Lennon* (1897) 166 U. S. 556, 18 (1890) 4 Sim. 13; Lane v. Newdigate 41 L. ed. 1113.

¹⁴ Durrell v. Pritchard (1865) L. R. 1 803. Ch. 244; Great North of England etc. R.

¹⁵ Spencer v. London etc. R. Co. (1836) 8 Sim. 193; Rankin v. Huakiason Pet. 78, 8 L. ed. 53.

(1830) 4 Sim. 13; Lane v. Newdigate

(1804) 10 Ves. Jr. 192.

¹⁶ Gibson, *Suits in Chan.* (2d ed.)

judgment obtained in a court of law; and it could be had only where the defendant in such a bill made default either by failing to appear or by failing to demur, plead, or answer within the time limited by law, after having been duly served with a subpoena. This injunction could also be had where the defendant put in an answer that was afterwards adjudged to be insufficient, an insufficient answer being considered equivalent to no answer at all. The distinguishing feature of the common injunction was that it could be obtained upon a motion as of course; and no notice to the party to be affected by the injunction was necessary.¹⁷

§ 2291. Special Injunction.

All other injunctions than such as were obtained on motion as of course, under the conditions above stated, were called special injunctions. These were not grantable as of course, but only upon the special facts of each case, and upon formal motion, of which the other party was required to be given due notice. The granting of special injunctions was considered to be always a matter of judicial discretion; and good grounds for the order had to be shown in the bill and affidavits, or in the bill and answer.¹⁸

§ 2292. Common and Special Injunctions in Federal Practice.

The distinction between common injunctions and special injunctions is of little importance in the federal courts, though some notice of it appears in equity rule 55. By an early act of Congress it was declared that the writ of injunction should not be granted in any case "without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same."¹⁹ While this statute was in force, no sort of injunction could properly be considered as being grantable as of course; and hence all injunctions granted by the federal courts had to be considered special injunctions.²⁰

When equity rule 55 was promulgated in 1842, a provision in conformity with the practice of the English chancery was incorporated in it, recognizing the common injunction and declaring that such injunction could be issued as of course upon the failure of the defendant (in a suit to enjoin proceedings at law) to plead, answer, or demur. Now so long as the statute above referred to continued in

¹⁷ 3 Dan. Ch. Pr. 276-279.

¹⁸ 3 Dan. Ch. Pr. 297.

¹⁹ Act of March 2, 1793, ch. 22, sec. 5. McAll. 419.

²⁰ Perry v. Parker (1846) 1 Woodb. &

M. 290; Lawrence v. Bowman (1858) 1

force, this provision of equity rule 55 could hardly be considered as being effective, because in so far as it authorized the granting of an injunction without notice, it was clearly repugnant to the statute. However, the statutory provision in question was repealed upon the adoption of the Revised Statutes,²¹ and as a consequence the provision in equity rule 55, authorizing the granting of the common injunction upon default, has come to be effective. But the subject of common injunctions is not of any great importance in modern practice.

§ 2293. Restraining Order.

As used in the federal courts, injunctions may be conveniently divided into three classes: (1) Restraining orders, (2) preliminary injunctions, (3) final injunctions. The restraining order is a temporary, or interlocutory, order issued upon an *ex parte* order of the court, or judge. Its sole purpose is to restrain the person against whom it is granted from the doing of some particular act during the time an application for a preliminary injunction is pending. Restraining orders are issued under the authority of section 718 of the Revised Statutes, and notice to the party against whom the restraining order is obtained is unnecessary. The granting of a restraining order does not contemplate the continuance of such order in force throughout the whole litigation, but only until the regular motion for a preliminary injunction can be heard on due notice. It may be noted that the term "restraining order" is sometimes incorrectly used where the ordinary preliminary injunction is meant.²²

§ 2294. Preliminary Injunction.

The preliminary injunction is an interlocutory order, or writ issued in pursuance of such interlocutory order, granted at any time during litigation and before the final hearing and decree on the merits.²³ In the federal practice, preliminary special injunctions are granted only upon motion, and after due notice to the party to be affected.²⁴ The preliminary injunction is frequently spoken of as a provisional injunction; it is also called interlocutory injunction.

²¹ The provision in question was repealed by the failure of the revisers to incorporate it in the Revised Statutes and by the adoption of section 716 R. S., which is repugnant to the former provision. *Yuengling v. Johnson* (1877) 1 Hughes 610. ²² See, e. g., *Indianapolis Gas Co. v. Indianapolis* (1897) 82 Fed. 245; *Charles Adams v. Crittenden* (1881) 17 Fed. 42. ²³ *City of Marion* (1899) 98 Fed. 166. ²⁴ Though the original statutory provision prohibiting the issuance of injunctions.

§ 2295. Final Injunction.

The final injunction is granted only at a final hearing on the merits. It forms a part of the final decree in all cases where an injunction has been prayed for in a bill and the case is such as to justify the granting of it. The final injunction is usually perpetual, and it acts as a continual inhibition on the party against whom it is granted, restraining him from the assertion of some assumed right or perpetually enjoining him from the commission of an act that would be contrary to equity and conscience.

§ 2296. Statute and Rule Governing Issuance of Injunctions.

The issuance of the writ of injunction as a provisional remedy in the federal courts is governed by the following statute and rule.

1. Revised Statutes, section 719: Writs of injunction may be granted by any justice of the supreme court in cases where they might be granted by the supreme court; and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the supreme court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of a circuit court, in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court.

2. Equity rule 55: Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party, by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte* if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of court, or until it is dissolved by some other order of the court.

Injunctions otherwise than upon due notice hearing upon an application for an injunction have been repealed, equity rule 55. An injunction can be *ex parte*, if the adverse party does not appear at the time and place noticed for the hearing of the application. But the application. Equity Rule 55.

§ 2297. Injunction Granted by Supreme Court Justice.

Originally a justice of the supreme court could grant an injunction at any place in or out of the circuit in which the suit was instituted; but by the statute above quoted, his authority to grant an injunction elsewhere than within the circuit is restricted to cases where the parties stipulate for a hearing before him out of the circuit, or where the parties cannot present their application to the circuit or district judge. When the circuit and district judges are both absent, the supreme court justice may hear the application wheresoever he may be.²⁵

§ 2298. Injunction Granted by District Judge.

The limitation contained in the statute on the power of the district judge to issue an injunction applies only to the case where the district judge acts in vacation and in his capacity as district judge. A district judge, acting as a judge of the circuit court, can issue the writ as fully and freely as any circuit judge or circuit justice, acting in the same capacity, could issue it.²⁶ A writ issued by the circuit court held by a district judge is issued by the court and not by the district judge.²⁷

The action of a district judge, while holding the circuit court, in refusing to dissolve an injunction previously granted by himself is as effectual to continue the injunction in force as if the order had been made by the full circuit bench.²⁸

§ 2299. Injunction Granted by Circuit Judge.

Though a circuit judge has ample authority to grant an injunction in vacation, such an injunction will not be granted when the party has an opportunity to apply in a reasonable time to the circuit court sitting in term time; and the fact that the court when it convenes will be presided over by a district judge is immaterial.²⁹

²⁵ *Searles v. Jacksonville etc. R. Co.* (1873) 2 Woods 621, Fed. Cas. No. 12,596; *U. S. v. Louisville etc. Canal Co.* (1873) 4 Dill. 601, Fed. Cas. No. 15,633. ²⁶ *Parker v. Judges* (1827) 12 Wheat. 561, 6 L. ed. 729; *Industrial etc. Guaranty Co. v. Electrical Supply Co.* (C. C. A.; 1893) 58 Fed. 732, 7 C. C. A. 471.

²⁶ *Gray v. Chicago etc. R. Co.* (1864) 63 Fed. Cas. No. 5,713. ²⁸ *Goodyear Dental Vulcanite Co. v. Folsom* (1880) 3 Fed. 509.

²⁷ *Goodyear Dental Vulcanite Co. v. Folsom* (1880) 3 Fed. 509.

§ 2300. Duration of Injunction Granted in Vacation.

The judges of the supreme court have the power to grant interlocutory injunctions during vacation that will not expire with the vacation.³⁰ Injunctions granted in vacation by district judges do not continue longer than to the circuit court convening next after the granting of the injunction. This is settled by an express provision of the statute above quoted. Upon the question whether the efficacy of an injunction granted by a district judge ceases immediately upon the convening of the court and the commencement of the new term or whether it continues in force during the term, the statute is not clear. It is commonly understood, however, as referring to the commencement of the term.³¹ It thus becomes important for a party who has obtained an injunction from a district judge in vacation to apply at once upon the convening of the court for an order continuing the injunction in force; and undoubtedly the statute must be construed to give him a reasonable time for the making of such a motion.

In limiting the duration of the injunction granted in vacation time to the commencement of the ensuing term, the statute refers only to injunctions granted by district judges. So far as this statute is concerned, the circuit judges have the power to issue injunctions that will run on beyond the opening of the ensuing term and continue in force until they are dissolved by the court. Equity rule 55, however, contains a provision that seems to have been generally, though no doubt erroneously, understood as limiting injunctions granted by circuit judges in vacation in the same way that the statute limits injunctions granted by district judges. This rule says that in every case where an injunction is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court. It will be noted that the point of view indicated in this provision is entirely different from that indicated in the similar provision in the statute; for, whereas the statute contemplates putting a limit on the duration of injunctions granted by district judges, so that they shall not continue too long, the rule, on the other hand, contemplates that the duration of the injunction shall not be too short. The object of the rule is to make it certain that injunctions granted in vacation shall continue in force at least until the opening of the ensuing term. The

³⁰ *Gray v. Chicago etc. R. Co.* (1864) *Land Co.* (C. C. A.; 1895) **65 Fed. 645**, *Woolw.* **63**, *Fed. Cas.* No. **5,713**. ³¹ *Gray v. Chicago etc. R. Co.* (1864) **13 C. C. A. 73**; *U. S. v. Weber* (1902) **114 Fed. 951**, ¹ *Woolw.* **66**; *Dreutzer v. Frankfort*

rule does not inhibit the judge granting the injunction from giving it a longer duration than to the next term; but on the contrary, the rule plainly implies that the court may, if it sees fit, make an injunctive order that shall continue in force after the opening of the term and until it is dissolved. Where the injunction is so framed and ordered by a circuit judge, it will undoubtedly continue in force until dissolved, notwithstanding the arrival of the ensuing term.³² The terms of the rule are broad enough to apply to injunctions granted by both district and circuit judges; but a district judge cannot make an injunction that will be effective beyond the ensuing term, for on this point the rule is controlled by the statute.

§ 2301. Effect of Injunction against Judgment at Law.

An injunction against a judgment at law does not operate as a supersedeas of the judgment. The plaintiff in the judgment at law may therefore proceed to execution, and the validity of the process is not thereby endangered. But undoubtedly the court of law would upon a proper showing stay the proceedings; and the plaintiff who would proceed to disobey the injunction would of course incur the penalty of contempt in the court of equity.³³

Preliminary Steps in Procuring Injunction.

§ 2302. Injunction Grantable Only upon Suit Brought.

The first step in the procurance of an injunction consists in the filing of a bill; and there is said to be no instance of this writ having been granted in modern times in the English chancery without the institution of a suit.³⁴ Certainly it is always necessary that there should be a suit presently instituted or one already pending such as to justify the granting of the writ as an incident to that suit.

§ 2303. Prayer for Issuance of Writ.

The second requisite is that the bill upon which the injunction is sought should be specifically framed as an injunction bill and should

³² But as suggested in the text the Story, J. in *Boyle v. Zacharie* rule in question has sometimes been understood as limiting the power of the circuit judge in the same way that the statute limits the power of a district judge. ³³ Pet. 658, 8 L. ed. 536. ³⁴ 1 Smith, Ch. Pr. (2d ed.) 586. Gray v. Chicago, Iowa etc. R. Co. (1864) 1 Woolw. 67, 68. The granting of injunctions without a ment against Cardinal Wolsey. Fletcher, Eq. & Pr. 499.

contain a special prayer asking for the injunction.⁸⁵ The prayer for general relief is not sufficient to authorize the granting of the writ.⁸⁶ This rule, however, applies more specially to the provisional writ of injunction, or injunction *pendente lite*. Upon finally adjudicating a cause and upon granting relief appropriate to the case made in the bill and established by the proof, the court will frequently interpose by injunction, although it is not prayed for in the bill.⁸⁷

According to the practice of the English chancery, it was required that the prayer for relief should be repeated in the prayer for process;⁸⁸ but the necessity for this recital in the prayer for process has been dispensed with by equity rule 23, and it is sufficient that the prayer be contained in the prayer for relief.

§ 2304. Exceptions to Rule Requiring Special Prayer.

The rule prohibiting the granting of the provisional writ of injunction, or injunction *pendente lite*, where it is not specially prayed for, is subject to some exceptions. For instance, where a court has acquired jurisdiction over the parties and over the subject-matter, it may always interfere to protect the subject-matter of the suit and for the purpose of controlling the proceedings before it, although no injunction has been prayed for. When thus used the writ is not so much an instrument of relief to one or the other party, as it is a means by which the court controls the proceedings in the cause before it. Instances of this use of the injunction frequently occur in receivership proceedings and in cases of foreclosure. So, where the court has undertaken the administration of an estate, it may restrain a creditor who is not a party to the suit from proceeding against the estate for his own individual debt.⁸⁹

§ 2305. Allegations of Injunction Bill.

The allegations of the bill seeking an injunction should be sufficiently full and precise to make out a case for the issuance of such

⁸⁵ Equity Rule 21.

⁸⁶ 3 Dan. Ch. Pr. 301; 1 Dan. Ch. Pr. 502.

⁸⁷ 1 Dan. Ch. Pr. 503; *Gaines v. Hale* (1870) 26 Ark. 199.

⁸⁸ *Wood v. Beadell* (1829) 3 Sim. 273; *Walker v. Devereaux* (1833) 4 Paige 229.

⁸⁹ By an anomalous practice that grew up in the English court of chancery in the latter part of the eighteenth cen-

tury, it became permissible, in suits for

the administration of an estate, for a party to such suit (as, for instance, an

executor, administrator, heir, legatee, or creditor) to obtain in that suit and upon mere motion, an injunction to re-

strain a creditor of the estate from pros-ecuting an action at law. This practice

dispensed with the filing of an independ-ent bill; but it was only allowed in cases where there was a pending suit in

extraordinary process. Such a bill is not only a pleading but contains matter to be used as an affidavit upon the application for the injunction. As a pleading, the bill should show a clear right to relief against the wrong complained of; and as an affidavit, it should set forth in detail the facts and circumstances of the case in such way as to make clear the nature of the wrong and to show that irreparable injury will be done if the writ is not granted. Being a harsh remedy, an injunction will not be granted, except upon a clear *prima facie* case, and upon positive averments of the equities upon which the application is based.⁴⁰ The bill must show that the plaintiff has no adequate remedy at law.⁴¹

§ 2306. Allegations Must Be Specific.

The bill must set forth facts; and mere allegations of conclusions will not avail.⁴² It is not sufficient to allege the bare fact, for instance, that the acts complained of are invalid, that the defendant has been or is guilty of an abuse of trust, that a mistake has been committed, that the defendant has erected and is maintaining a nuisance, or has committed and is committing waste; but in each particular instance, such facts must be alleged as will enable the court to determine that the grounds relied upon for an injunction actually exist.⁴³

§ 2307. Statements Made on Information and Belief.

Allegations made upon information and belief are, as a rule, insufficient. In the ordinary injunction bill, which is sworn to by the plaintiff, it is necessary to state the facts on which the application is based in positive and direct terms, and as being within the plaintiff's personal knowledge. But this rule is not always insisted upon, and is subject to exceptions. Thus where discovery is sought, and the facts appear to lie in the defendant's knowledge, a statement that the plaintiff is informed and believes that a fact is true and that he therefore charges the fact to be true, is enough.⁴⁴ And in any case where the matters do not lie within the personal knowledge of the plaintiff,

which the creditor could come in and Cranch C. C. 394; Woodman *v.* Killprove his claim. 3 Dan. Ch. Pr. 298, bourn Mfg. Co. (1867) 1 Biss. 546; 299.

⁴⁰ Gibson, Suits in Chan. (2d ed.) 298; St. Louis Type Foundry *v.* Carter 838. etc Printing Co. (1887) 31 Fed. 524.

⁴¹ Francis *v.* Flinn (1886) 118 U. S. 385, 30 L. ed. 165. ⁴³ 10 Encyc. of Pl. and Pr. p. 927.

⁴² Wilson *v.* Bastable (1806) 1 Paige 157. ⁴⁴ Campbell *v.* Morrison (1838) 7

he may allege those matters upon information and belief;⁴⁵ but the statements of the bill as to such matters should be corroborated as far as possible by the affidavits of persons having personal knowledge.⁴⁶

§ 2308. No Injunction on Defective Bill.

An injunction will not be granted in any case where the bill is so far defective as to be demurrable, and the defect is pointed out;⁴⁷ and sometimes the fact that a bill is general and lacking in specific averments will be taken as supplying a good reason for refusing an injunction, though the bill is not actually demurrable for want of equity.⁴⁸

Any demurrable defect in the allegations of an injunction bill may be cured by amendment;⁴⁹ and if the bill should fail to contain a prayer for an injunction, this defect may be amended at the time of the application for the injunction, though the absence of the prayer does not make the bill demurrable as a bill for relief.⁵⁰

§ 2309. Verification of Bill.

The bill should be duly verified by the oath of the plaintiff, or of his agent, or attorney, having knowledge of the facts. The purpose of the oath is to entitle the plaintiff to use the bill as a sort of affidavit, upon the application for the writ of injunction. The oath is not necessary in so far as the bill merely seeks relief. A bill seeking injunctive relief is therefore never demurrable for lack of verification; and a permanent injunction can be granted as final relief regardless of whether the bill is verified or not.⁵¹

On an application for a temporary injunction, the fact that the bill is unverified has been held to be of no consequence where the defendant merely demurs to the bill. The demurrer admits the allegations of the bill to be true, and therefore verification is unnecessary.⁵²

Application for Temporary Restraining Order.

§ 2310. Filing Bill—Application for Restraining Order.

A restraining order cannot be granted, or at least cannot be made effective, until the bill has been filed. This does not mean that the

⁴⁵ 10 Encyc. of Pl. and Pr. p. 930.

⁵⁰ Wood v. Beadell (1829) 3 Sim.

⁴⁶ Gibson, Suits in Chan. (2d ed.) 273.

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828.

Woodworth v. Edwards (1847) 3

⁴⁷ Brooks v. O'Hara (1881) 8 Fed. Woodb. & M. 120; Hughes v. Railroad Co. (1883) 18 Fed. 106; Black v. Allen 520.

⁴⁸ United States v. Jellico etc. Co. Co. (1890) 42 Fed. 618, 9 L.R.A. 433. (1890) 43 Fed. 898.

⁵² Cobb v. Clough (1897) 83 Fed.

⁴⁹ Meyers v. Shields (1894) 61 Fed. 604.

713.

bill must be filed in the clerk's office before the application is laid before the court, or judge. In fact a very common practice is first to present the bill to the judge and get his fiat for a restraining order. The judge, upon granting the fiat for the restraining order, merely indorses an order for the writ to issue upon the bill being filed, and upon the execution of such bond as he sees fit to require. The bill is then taken to the clerk's office, and a subpoena is issued at the same time as the restraining order, and both are served upon the defendant together.⁵³ At the same time the defendant should be served with notice of the motion for a preliminary injunction, if such notice has not been already otherwise served.⁵⁴ The temporary restraining order may be served at the same time as notice of the application for the appointment of a receiver.⁵⁵

Universal Savings & Trust Co. v. Stoneburner (C. C. A.; 1902) 113 Fed. 251, 51 C. C. A. 208: A bill having been prepared was submitted to the judge of the circuit court at chambers with a request for a restraining order. Upon due consideration of the bill the court granted the order. The bill was not actually filed with the clerk until two days later. A subpoena was then issued. The restraining order was issued at the same time as the subpoena and both were served on the defendant together. It was held that the restraining order was not rendered invalid by the fact that it was given out by the judge before the bill was filed.⁵⁶

§ 2311. Bond to Indemnify Defendant.

Upon granting a fiat for a restraining order the court may, in its discretion, require the plaintiff to execute a bond with good security to indemnify the defendant for any loss he may sustain by reason of the wrongful suing out of the restraining order.⁵⁷

⁵³ The restraining order of the federal courts is the same in substance as the preliminary *ex parte* injunction sometimes granted in the English chancery at the institution of the suit. In the practice of that court it was customary to serve the injunction at the same time as the subpoena. 3 Dan. Ch. Pr. 353

for the Northern District of California, there is an explicit provision to the effect that no application for a restraining order or preliminary injunction shall be entertained by the court or judge until after a bill has been filed in the clerk's office and a subpoena issued thereon. This rule of course supplies a rule for the guidance of the judges; but clearly, if a judge saw fit not to follow the rule in any case, the restraining order would be entirely

⁵⁴ *Yuengling v. Johnson* (1877) 1 Hugh. 607, Fed. Cas. No. 18,196; *Joseph Dry Goods Co. v. Hecht* (C. C. A.; 1903) 57 C. C. A. 64, 120 Fed. 760

valid, if issued and made effective upon Watkins (C. C. A.; 1901) 48 C. C. A. 254, 109 Fed. 101; *Cabaniss v. Reco Min. Co.* (C. C. A.; 1902) 54 C. C. A. 190, 116 Fed. 318.

⁵⁵ *Consolidated Fruit Jar Co. v. Whitney* (1874) Fed. Cas. No. 3,132.

⁵⁶ In Rule No. 29 of the Circuit Court

§ 2312. Considerations Affecting Exercise of Judicial Discretion.

The object of a restraining order is to preserve the *status quo* while the application for a preliminary injunction is pending.⁵⁸ It should only be granted where there is shown to be danger of irreparable injury from the delay incident to the giving of the notice of the motion for the injunction.⁵⁹ The granting of a restraining order, in anticipation of the hearing on a motion for an injunction, is a serious exercise of power; and it should not be granted except upon a moral certainty of irreparable injury if it be refused. Nor should the writ be continued in force when it is made to appear that such a result is not imminent.⁶⁰ The restraining order should never be granted where, upon the facts shown in the bill, no pressing necessity appears to exist;⁶¹ and where the filing of the bill itself creates a *lis pendens* in favor of the plaintiff that will fully protect his rights, a restraining order will not be allowed.⁶²

The circumstance that a restraining order will do no harm to the party against whom it is aimed is not sufficient to justify granting it. There must affirmatively appear to be some necessity for granting it and that it would do the other party some good. Otherwise the issuance of it would be vain.⁶³

§ 2313. Validity of Order as Affected by Jurisdiction of Court.

A restraining order issued in a cause over which the court has no sort of jurisdiction whatever is void; but if the court has essential jurisdiction, its injunctive order, though irregular, or based upon a demurrable bill, is valid; and contempt proceedings will lie against a defendant who violates it.⁶⁴

§ 2314. Limiting Duration of Restraining Order.

The preliminary restraining order should contain a statement limiting its duration. For instance, it may be expressed that the order is to remain in force until further order of the court, or until the court hears and decides upon the motion for the preliminary

⁵⁸ Joseph Dry Goods Co. v. Hecht (C. C. A.; 1903) 57 C. C. A. 64, 120 Fed. 760. ⁶¹ Worth Mfg. Co. v. Bingham (C. C. A.; 1902) 116 Fed. 785, 54 C. C. A. 119.

⁵⁹ Industrial etc. Co. v. Electrical Supply Co. (C. C. A.; 1893) 7 C. C. A. 471, 58 Fed. 737; Wabash R. Co. v. Hannahan (1903) 121 Fed. 563.

⁶⁰ Ryan v. Seaboard etc. Co. (1898) 89 Fed. 385, 387. ⁶² Barstow v. Becket (1899) 110 Fed. 826. ⁶³ Teller v. United States (C. C. A.; 1901) 113 Fed. 463, 51 C. C. A. 297.

⁶⁴ United States v. Agler (1894) 62 Fed. 824. Compare, post, §§ 2483, 2489.

injunction, or upon the motion to set aside the restraining order, as the case may be.⁶⁵ Where the application for the preliminary injunction takes the form of a rule to show cause why a preliminary injunction should not be granted, the restraining order will be made operative until the hearing and determination of such rule to show cause.⁶⁶

§ 2315. Discharge of Restraining Order.

A defendant against whom a restraining order has been granted may apply at once to dissolve the restraining order; and it is not necessary that he should first answer before making his motion to dissolve.⁶⁷ This rule is applied even though the bill is one for discovery.⁶⁸ The motion to dissolve a restraining order is frequently heard at the same time as the motion for an injunction *pendente lite*.⁶⁹

A restraining order should be dissolved where it appears to have been improvidently granted,⁷⁰ or where it appears that the plaintiff has no such claim to the issuance of the writ as appeals to the conscience of the chancellor.⁷¹

An order vacating a restraining order becomes effective when and as the court makes it effective. In one case the court in its opinion declared that the stay in that case should be vacated and that the mere filing of the opinion should be sufficient evidence of such vacation.⁷²

Application for Preliminary Injunction.

§ 2316. Motion for Interlocutory Injunction.

The regular preliminary, or interlocutory, injunction is commonly applied for, upon notice, by simple motion or petition;⁷³ but the application is sometimes brought up by means of a rule to show cause why the injunction should not issue. Special injunctions can be obtained at almost any stage of the cause. They may be moved for

⁶⁵ See *Prout v. Starr* (1903) 188 U. S. 537, 539, 47 L. ed. 584, 585.

⁷⁰ *Worth Mfg. Co. v. Bingham* (C. C. A.; 1902) 116 Fed. 785, 54 C. C. A.

⁶⁶ *Du Pont v. Northern Pac. R. Co.* 119,

(1883) 18 Fed. 467; *Stafford v. King* (C. C. A.; 1898) 32 C. C. A. 536, 90 Fed. 136.

⁷¹ *Central Trust Co. v. Wabash etc. R. Co.* (1885) 25 Fed. 1.

⁶⁷ *Huntington v. New York* (1902)

⁷² *Metropolitan Grain v. Stock Exch.* 118 Fed. 683, 688.

v. Chicago etc. (1883) 15 Fed. 847.

⁷³ *Toledo etc. R. Co. v. Pennsylvania*

⁶⁸ *Fenwick Hall Co. v. Saybrook Co.* (1893) 54 Fed. 730, 19 L.R.A. 387.

(1895) 66 Fed. 389.

⁶⁹ *St. Louis etc. Co. v. Carter etc.*

Co. (1887) 31 Fed. 524.

either before or after answer; and they may even be granted before the defendant has appeared.⁷⁴

§ 2317. Application after Proof Taken.

After the testimony on both sides has been taken and proof is complete for a hearing on the merits, the plaintiff may apply for an interlocutory hearing in order to obtain a preliminary injunction. The court has refused to entertain an application for a preliminary injunction made after the plaintiff has taken his proof, but before the defendant has taken his. Such a practice would put the defendant at a disadvantage, as it would force him to rely on affidavits merely. Such an application could, however, be maintained upon any special circumstances requiring it.⁷⁵

§ 2318. Service of Notice.

The notice of the application for a special injunction *pendente lite*, which is required to be given upon every such application, may be given in any manner conformable wth the usage and practice of the courts of equity. It may be issued from the office of the clerk of the court and served by an officer; or it may be issued by the party who desires to obtain the injunction, or his solicitor, and may be served by him or his clerk in any mode allowed by local practice. It is not absolutely necessary that the notice should emanate from the clerk's office.⁷⁶

⁷⁴ 2 Dan. Ch. Pr. 344.

⁷⁵ *Consolidated Retail Booksellers v. Ward* (1904) 130 Fed. 389.

⁷⁶ *In re Ogles* (1899) 93 Fed. 432, Hammond, J. suggested that the notice of the application for an injunction, to be binding, must be issued from the court itself and that it cannot be issued by the parties. We can by no means accept this dictum as embodying the correct practice. The peculiar wording of equity rule 55 and of section 718 R. S. does indeed lend some countenance to that idea; but the language of those provisions is not such as to make the interpretation in question at all necessary, and as such interpretation is contrary to the usual practice of the court of equity, and contrary to good sense, it should not be accepted.

As we interpret equity rule 55, it means that the special injunction shall be grantable only by the court in term, or by a judge thereof in vacation, after

due notice has been given to the other party. The rule is not to be understood as requiring that the notice shall issue from the court or be granted by the judge. To get the true sense of the rule, it must be read as if the expression "upon due notice to the other party" were enclosed in a parenthesis, thus: "But special injunctions shall be grantable only (upon due notice to the other party) by the court in term," etc.

Section 718, R. S., should apparently be construed as if it read as follows: "Whenever notice is given of a motion for an injunction [to be issued] out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion." It is the injunction that is to be issued out of a circuit or district court, and not the notice.

§ 2319. Reasonable Period of Notice.

The period of time to elapse between the giving of notice of a motion for a preliminary injunction and the time fixed for the hearing of such motion should conform to the local rules of the court; and if this period is not fixed by these rules, the notice should be given at such time as to allow the defendant a reasonable opportunity to appear and contest the motion. What will constitute reasonable notice must depend upon the peculiar circumstances of each case. In some of the circuits four days' notice of the application must be given.⁷⁷

§ 2320. Service of Copy of Bill and Affidavits.

At the same time that the plaintiff serves notice of his motion for an injunction, he should serve a copy of his bill and a copy of any affidavits on which he proposes to rely to support the motion, where the local rules require such service of the bill and affidavits.⁷⁸

*Hearing of Motion for Injunction.***§ 2321. Mode of Proof Subject to Court's Control.**

The proceedings in regard to the hearing of a motion for an injunction are subject to the control of the court, within reasonable limits; and it has authority to define the mode in which the proofs shall be adduced. In the exercise of the discretion of the court, it is undoubtedly competent for it to require that the witnesses shall be examined and cross-examined upon formal deposition or in the presence of the court; and it may fix the time when the witnesses shall be tendered and the examinations completed. But of course the motion is commonly heard on the pleadings and affidavits as hereafter indicated.⁷⁹

⁷⁷ See local rules quoted in the succeeding note.

⁷⁸ Hardt v. Liberty etc. Co. (1886) 27 Fed. 788.

By equity rule No. 105 of the Circuit Court for the Southern District of New York a motion for an injunction will not be heard unless a copy of the bill and of the depositions—which term no doubt includes affidavits—to be offered in its support, shall be served on the adverse party or his attorney at least four days before motion is made.

No motion for an injunction shall be heard until four days after service of a copy of the bill and proofs on which the motion is based, upon the party to be affected or his solicitor. But the plaintiff may obtain an order authorizing the motion on any shorter time, where the court is satisfied that such notice cannot be given without risk of injustice. After such notice, and until the party to be affected by the injunction is ready for a hearing, the injunction, if granted, shall be deemed to have been granted at the time notice of the motion was actually received, if the court sees fit to order the injunction as of the date of the notice. No. 10 of Rules in Equity of Circuit Court for E. D. Pennsylvania.

⁷⁹ By rule 12, in equity, of the circuit court for E. D. Pennsylvania, the

§ 2322. Determining Whole Cause on Motion for Injunction.

As a general rule it is not practicable for a court to undertake finally to dispose of a cause on a motion for a preliminary injunction, but situations occasionally arise where it is desirable and proper to do so. This step is sometimes taken even in the court of appeals.⁸⁰ But this court, like the lower court, will never determine a cause finally on an appeal from an order granting an interlocutory injunction, where the right of the controversy can only appear after full proof.⁸¹

§ 2323. Plaintiff's Proofs.

At the hearing of the motion, the plaintiff is permitted to rely on the statements of his sworn bill and on any affidavits in chief that he may see fit to adduce in support of his motion.⁸² If the affidavits accompanying a bill make out a proper case for the granting of an injunction, the injunction may be granted though the bill is not itself sworn to.⁸³

§ 2324. Use of Documents.

Documentary proof can be used in support of an application for a preliminary injunction, or in opposition to such a motion, where the document has the force of an affidavit and is sufficiently authenticated.⁸⁴ Exhibits accompanying the bill are to be considered in passing on the question of preliminary injunction.⁸⁵

§ 2325. Requisites and Scope of Plaintiff's Affidavits.

An affidavit in support of a motion or petition for an injunction should be confined to the case made in the bill. Any statements intro-

court is expressly empowered to have out a good case for a preliminary injunction and is not met by a sufficient answer or by affidavits put in by the defendant, the plaintiff can of course be satisfactorily disposed of upon *ex parte* affidavits. Doubtless this rule must be considered as giving expression to a general principle that was already in existence.

⁸⁰ *Allegheny Oil Co. v. Snyder* (C. C. A.; 1900) 45 C. C. A. 604, 106 Fed. 764.

⁸¹ *City of Knoxville v. Africa* (1896) 77 Fed. 501, 510, 23 C. C. A. 252.

⁸² The sworn bill of the plaintiff is an affidavit in itself, and if the bill makes

⁸³ *Smith v. Schwed* (1881) 6 Fed. 455.

⁸⁴ *Schermehorn v. L'Espenasse* (1796)

⁸⁵ *Miller v. Consolidated Lake Superior Co.* (1901) 110 Fed. 480.

ducing a new ground for relief will be disregarded.⁸⁶ The affidavits cannot enlarge the scope of the bill.⁸⁷

§ 2326. Defendant's Case in Opposition to Motion.

The defendant, on the other hand, can show cause against the allowance of an injunction in various ways. He may, for instance, move to dismiss the bill as having been irregularly filed, or he can demur, or plead.⁸⁸ The common mode of proceeding is by putting in a sworn answer and by producing such affidavits as may be available to the defendant for the purpose of controverting the plaintiff's claim to injunctive relief. The defendant may, however, resist the application by affidavits alone, before putting in his answer; but this course is seldom advisable. Where the allegations of the bill are fully met by the answer and affidavits, the preliminary injunction will be refused.⁸⁹

§ 2327. Sworn Answer Used as Affidavit by Defendant.

Though the oath be waived, the answer may nevertheless be sworn to and used as an affidavit against the motion for a preliminary injunction or upon a motion to dissolve the same. The verification in such case should conform to the requirements of affidavits. Thus, a verification to an answer intended to be so used is insufficient unless it appears that the party who swears to its statements has such information as to enable him to speak of his own knowledge. Verification by a solicitor made merely on his belief or information and belief without a showing that he has personal knowledge of the facts stated is not good.⁹⁰

§ 2328. Demurrer Not Overruled by Answer Used as Affidavit.

Upon the hearing of an application for a preliminary injunction, the sworn answer of the defendant is used as an affidavit and not as a pleading. Hence that rule of pleading by which an answer to the

⁸⁶ *Montgomery etc. Co. v. Chapman* (1904) 128 Fed. 197.

⁸⁷ *Leo v. Union Pac. Ry. Co.* (1883) 17 Fed. 273.

⁸⁸ The defendant may show cause against the allowance of an injunction either by plea, answer, or demurrer to the bill or by parol exception to its legal sufficiency or by deposition dis-

Court for S. D. New York. The term "deposition," as used in this rule, is evidently to be understood as including affidavita.

⁸⁹ *Mitchell v. Colorado etc. Co.* (1902) 117 Fed. 723; *Cohen v. Delavina* (1900) 104 Fed. 946.

⁹⁰ *Lake Shore etc. Co. v. Felton* (C. C. A.; 1900) 103 Fed. 227. 43 C. C. A. 189.

whole bill is held to overrule a demurrer to the whole bill does not apply. Consequently a defendant who demurs to the whole bill and answers to the whole may, upon the hearing of the application, have the benefit of his answer as an affidavit and may also have the benefit of his demurrer; and if the demurrer is good, the bill will be dismissed, notwithstanding the defendant has answered fully.

Cosmos Exploration Co. v. Gray Eagle Oil Co. (1900) 104 Fed. 20: Upon the filing of the bill, an order was made on the defendant to show cause why a preliminary injunction should not be granted. The defendant appeared by counsel and filed demurrers to the bill for want of equity and for want of jurisdiction. He also filed a verified answer for the purpose of meeting the application for an injunction. Affidavits were filed on both sides. The demurrer and order to show cause were heard together, the verified answer being used as an affidavit. The court denied the application for an injunction, sustained the demurrers, and dismissed the bill. No question was raised on the point that the answer had overruled the demurrer; but obviously such point would not have been well taken, and the case was rightly disposed of.

§ 2329. Affidavits in Rebuttal Admissible Only by Leave of Court.

The affidavits that the plaintiff and defendant are respectively allowed to put in at the hearing of a motion for a preliminary injunction are original affidavits. The plaintiff's affidavits must be such as support his bill, and the defendant's affidavits must be such as meet the case made in the bill and such as support the defense shown in his answer (where an answer has been filed). In the present state of the practice of the federal courts, it is not permissible for the plaintiff, after his original affidavits have been filed and after they have been met by affidavits of the defendant, to file other affidavits to rebut the affidavits of the defendant, unless he has obtained leave of court to put in affidavits in rebuttal; and if he does put in affidavits in rebuttal without leave, they will be disregarded. He must rely on his bill and on his original affidavits.⁹¹ Similarly, when a defendant moving for the dissolution of an injunction puts in affidavits and his adversary puts in counter-affidavits, the moving party cannot then put in additional affidavits except by permission of the court; and this will not usually be granted unless the counter-affidavits that are to be met contain new and affirmative matter. Each party should, as far as possible, present his whole case in one set of affidavits.⁹² By local rules

⁹¹ *Benbow-Brammer Mfg. Co. v. Hardt v. Liberty etc. Co.* (1886) 132 Fed. 614. 27 Fed. 788.
Compare American Paper Barrel Co. v. Laraway (1886) 28 Fed. 141,

in some of the districts, the court is allowed, in its discretion, to admit affidavits on the part of the plaintiff rebutting the proofs offered by the defendant.⁹³ A court evidently has ample discretion in this respect without the aid of a rule.

§ 2330. Affidavits in Surrebuttal.

A court has discretion to admit affidavits, on the part of either party, in surrebuttal, to meet the rebuttal affidavits of the other party. But the mere granting of leave to a plaintiff to put in rebuttal affidavits and the introduction of such affidavits by him, does not of itself authorize the defendant to put in affidavits in surrebuttal.⁹⁴ The defendant should in such case apply to the court and obtain express leave to put in the affidavits in surrebuttal.

§ 2331. Affidavits Taken after Expiration of Time Allowed.

After the expiration of the time fixed by stipulation for the taking and filing of affidavits, neither of the parties may without permission of the court adduce other affidavits; and if any be filed, they will be disregarded.⁹⁵

§ 2332. Weight of Affidavits and Other Proof.

In weighing the evidentiary value of affidavits on motions for the granting or dissolution of an injunction, the court is not controlled by the mere number of the affiants. Here as elsewhere the preponderance of evidence does not depend on the number of witnesses but on their information, candor, and apparent truthfulness.⁹⁶

In considering the propriety of granting a preliminary injunction on the case made by the bill, answer, and affidavits, the court is entitled to draw inferences unfavorable to one of the parties who presumably has it in his power to show the exact state or condition of facts on a particular material point but fails to do so.⁹⁷ The failure

⁹³ Further proofs may be allowed in practice in patent cases, see Amendment of May 18, 1846, to Equity Rules of the circuit for that circuit.

⁹⁴ American Paper-Barrel Co. v. Laraway (1886) 28 Fed. 141.

⁹⁵ Ford v. Taylor (1905) 140 Fed. 356.

⁹⁶ See Cohen v. Delavina (1900) 104 Fed. 946.

⁹⁷ Harriman v. Northern Securities Co. (1904) 132 Fed. 464 (reversed on other point) (1905) 197 U. S. 244, 49 L. ed. 739.

Circuit Court for E. D. Pennsylvania.

Court for S. D. New York. As to the

of the answer to deny a material allegation of the bill is a strong argument in favor of granting the preliminary injunction even though such allegation be denied in affidavita.⁹⁸

Use of Affidavits to Contradict Answer.

§ 2333. Affidavits Not Permitted under Former Practice.

Of late years the practice of the courts of equity in regard to the use of affidavits at the hearing of a motion for an injunction or at the hearing of a motion to dissolve an injunction has undergone considerable change; and as may be readily supposed, this change has been in the direction of the more liberal admission of affidavits. The rule in the English chancery was that the plaintiff could use affidavits in support of his bill where the application for the injunction was made before the defendant had put in his answer but not after an answer was filed. If the plaintiff, instead of applying for the injunction upon affidavits before answer, waited until the defendant had answered, he was compelled to rest his claim to an injunction upon the disclosures made in the answer; and he was not entitled, either for the purpose of obtaining or of continuing an injunction, to read any affidavits in opposition to the answer.⁹⁹ Lord Eldon once observed that if the answer denies all the circumstances upon which the equity is founded, affidavits to contradict the answer are not admissible. "Though five hundred affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be read as to this purpose."¹⁰⁰ The situation where the rule was longest and most firmly insisted upon was that in which the question at issue was one of title.¹⁰¹ It was considered that the matter of title ought not to be decided collaterally upon affidavits, where the defendant had answered, but only upon the plain admissions of the answer.

§ 2334. Exceptions to This Rule.

The rule prohibiting the use of affidavits to contradict the answer was partly based on the weight attributed to the sworn answer, considered as evidence for the defendant; and it was partly based, no doubt, upon the idea that inasmuch as the injunction *pendente lite*

⁹⁸ Sperry etc. Co. v. Brady (1905) 134 Fed. 691.

⁹⁹ 1 Smith, Ch. Pr. (2d ed.) 595, 596.

¹⁰⁰ Claphan v. White (1802) 8 Ves. 36.

¹⁰¹ Norway v. Rowe (1812) 19 Ves. Jr. 150; Strathmore v. Bowes (1786) 2

Bro. Ch. 88, 2 Dick. 673; Poor v. Carlton (1837) 3 Sumn. 70; U. S. v. Parrott

Jr. 36, 37. 356.

embodies an extraordinary exercise of judicial power, it should not be granted unless the defendant admitted the material facts alleged in the bill. However, the rule was found to be unsatisfactory in the English chancery, and a number of exceptions were engrafted on it. An exception was first admitted, it seems, in cases of waste and mischiefs analogous to waste, where there appeared to be danger of irreparable injury.¹⁰² An exception was next made in cases where an injunction and receiver were sought in partnership suits.¹⁰³ The rule was further undermined by a recognition of the principle that, while a plaintiff might not introduce affidavits directly to contradict the answer, he might yet introduce affidavits tending to establish pertinent facts collateral to the statements contained in the answer; and if material allegations made in the bill were neither admitted nor denied in the answer, affidavits could be received in support of such statements contained in the bill.¹⁰⁴ Again, it was a recognized principle that before the putting in of an answer could operate to deprive the plaintiff of the right to rely upon affidavits in opposition to the answer, the answer must be responsive to the bill and must be based on the personal knowledge of the defendant, not upon mere hearsay or upon information and belief.¹⁰⁵

§ 2335. Present Practice—Affidavits Admissible to Show Danger of Injury.

The rule having been thus much impaired, the idea finally became accepted, or at least in the American courts, that inasmuch as every application for a special injunction or for the dissolution of such injunction rests in the sound discretion of the court, there is really no reason why the court may not, in its discretion, admit affidavits to contradict a sworn answer upon any and every point whatever, where it should appear that irreparable mischief might otherwise be done. Nearly three-quarters of a century ago Judge Story noted the fact that the practice in regard to the use of affidavits upon these applications was rather unsettled, and was decidedly more liberal in America than in England; and this learned judge emphatically said that he would not hesitate to admit affidavits against an answer wherever irreparable injury might arise from denial of the injunction.¹⁰⁶ This observation was made, it will be noted, long before the rule of practice

¹⁰² *Hicks v. Michael* (1860) 15 Cal. 116.

¹⁰⁵ *Poor v. Carleton* (1837) 3 Sumn. 70, Fed. Cas. No. 11,272.

¹⁰³ 1 *Smith, Ch. Pr.* (2d ed.) 596.

¹⁰⁶ *Poor v. Carleton* (1837) 3 Sumn.

¹⁰⁴ 1 *Smith, Ch. Pr.* (2d ed.) 597.

⁷⁰, 83, *post*, § 2411.

was adopted which permits the plaintiff to waive the answer under oath; and the adoption of this latter rule supplies an additional reason for now allowing affidavits to be used against the answer, since it is obvious that the sworn answer, where the oath is waived, can be nothing more than a mere affidavit.¹⁰⁷ At any rate, the modern practice admits affidavits against the allegations of the answer wherever the purpose of the affidavit is to show a likelihood of irreparable injury. The actual practice of the courts in regard to the admission of affidavits against the statements of the answer seems, however, to be decidedly more liberal than the language of the decisions even in this day and time would seem to imply, as the statement that affidavits are not admissible against the answer, save in exceptional cases, such as waste, is still sometimes found in the cases.¹⁰⁸

¹⁰⁷ In England it is provided by 15 and 16 Vict. ch. 86, sec. 59, that the answer of the defendant shall be regarded merely as an affidavit, and that affidavits may be received and read in opposition thereto.

¹⁰⁸ *Champlain Const. v. O'Brien* (1900) 104 Fed. 930. In U. S. v. Parrott (1858) 1 McAll. 271, the old rule of practice is adhered to. But it must be considered that this and similar decisions are obsolete.

CHAPTER LVII.

INJUNCTIONS (*continued*).

Principles Governing Exercise of Discretion.

- § 2336. Discretion of Court as to Granting of Injunction.
- 2337. Considerations Bearing on Exercise of Discretion.
- 2338. Scope of Inquiry Limited to Existing Situation.
- 2339. Considerations Affecting Essential Jurisdiction of Court.
- 2340. Existence of Adequate Legal Remedy.
- 2341. Clear Case for Issuance of Writ Must Be Made Out.
- 2342. Showing of Irreparable Injury.
- 2343. Injunction Not Grantable on Showing of Doubtful Right.
- 2344. Injunction Proper Where Plaintiff's Right Clear.
- 2345. Doubtful Question of Law.
- 2346. Consideration of Right of Appeal.
- 2347. Consideration of Balance of Convenience.
- 2348. Adoption of Course Most Conducive to Minimum Injury.
- 2349. Consideration of Injury to Third Person.
- 2350. Injunction to Preserve Status Quo.
- 2351. Case Where Injunction Determinative of Whole Controversy.
- 2352. Injunction to Prevent Entry of Landlord.
- 2353. No Injunction against Accomplished Act.
- 2354. No Injunction Where Defendant Has Ceased Wrongful Acts.
- 2355. Miscellaneous Considerations Affecting Right to Injunction.

The Mandatory Injunction.

- 2356. Injunction Looks to Prevention of Future Injury.
- 2357. When Injunction Not Objectionably Mandatory.
- 2358. Power of Court to Grant Mandatory Injunction—Illustrations.
- 2359. Nature of Equity Justifying Mandatory Injunction.
- 2360. Use of Mandatory Injunctions to Regulate Traffic.
- 2361. Mandatory Injunction as Incident to Prohibitory Injunction.

Principles Governing Exercise of Discretion.

§ 2336. Discretion of Court as to Granting of Injunction.

The granting of an application for a preliminary injunction is a matter of sound judicial discretion,¹ to be exercised upon the particular circumstances of each case.² As was said by one of the federal

¹ 3 Dan. Ch. Pr. 297.

99, 24 L. ed. 381; *Edison Electric Light*

² *Buffington v. Harvey* (1877) 95 U. S. Co. v. Buckeye Electric Co. (1894) 64

judges in an early case: "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or [which is] more dangerous in a doubtful case than the issuing an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatening, so as to be avoided only by the protecting, preventing process of injunction."⁸

§ 2337. Considerations Bearing on Exercise of Discretion.

The general principles by which the courts are governed in passing on applications for interlocutory injunctions, and in determining whether the circumstances of any particular case are sufficient to justify the issuance of the writ, have been judicially stated with much variety of phrasing in innumerable cases. The following extracts from opinions rendered in federal courts contain about as good a description of the conditions under which the writ ought to be issued, or refused, as could probably be found.

1. *Harriman v. Northern Securities Co.* (1904) 132 Fed. 464, 475: The considerations that govern the exercise of judicial discretion in passing upon an application for a preliminary injunction were well stated in this case as follows: "The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circum-

Fed. 225, 228; Shinkle etc. Co. v. Louis- Abb. (U. S.) 416; New York Grape ville etc. R. Co. (1894) 62 Fed. 600; Sugar Co. v. American Grape Sugar Co. Norton v. Hood (1892) 12 Fed. 763; (1892) 20 Blatchf. 386; Andrae v. Red-Chicago etc. Co. v. Dey (1888) 35 Fed. field (1875) 12 Blatchf. 407; Fairbanks 886, 1 L.R.A. 744; Western Union Tel. v. Jacobus (1877) 14 Blatchf. 337; Ay-Co. v. Mayor etc. New York (1889) Ling v. Hull (1865) 2 Cliff. 494; Clum 38 Fed. 552, 3 L.R.A. 449; Northern v. Brewer (1885) 2 Curt. C. C. 506; Pac. R. Co. v. St. Paul etc. R. Co. (1801) Wells v. Gill (1872) 6 Fisher Pat. Cas. 47 Fed. 536; Indianapolis Gas Co. v. 89; Singer Mfg. Co. v. Union Button-Indianapolis (1897) 82 Fed. 245; Sanihole etc. Co. (1873) 6 Fisher Pat. Cas. tary Reduction Works v. California etc. 480; Earth Closet Co. v. Fenner (1871) Co. (1899) 94 Fed. 603, 607; Charles v. 5 Fisher Pat. Cas. 15; Irwin v. Dane City of Marion (1899) 98 Fed. 166; (1871) 4 Fisher Pat. Cas. 359; Tucker Board of Trade v. C. B. Thompson etc. v. Carpenter (1841) Hempat. 440; Law- Co. (1900) 103 Fed. 902; Miller v. Con- sulted etc. Co. (1901) 110 Fed. 480; Batten v. Silliman (1885) 3 Wall. Jr. Wallace v. Arkansas Cent. R. Co. (C. 124; Goodyear v. Day (1862) 2 Wall. Jr. C. A.; 1902) 118 Fed. 422, 55 C. C. A. 289; Orr v. Littlefield (1845) 1 Woods. 192; Tampa Waterworks Co. v. Tampa & M. 13. (1903) 124 Fed. 932; Western Union Baldwin, J. in Bonaparte v. Camden Tel. Co. v. Philadelphia etc. R. Co. and Amboy R. Co. (1830) Baldw. 217, (1903) 124 Fed. 974; Napier v. Wester- 218. (Quoted with approval in Truly hoff (1905) 138 Fed. 420; Shoemaker v. v. Wanzer (1847) 5 How. 142, 12 L. ed. National Mechanics' Bank (1869) 2 88.)

stances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is the factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business, through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect, and in aid of such relief, if any, as may finally be decreed to the complainant.⁴

2. *Allison v. Corson* (C. C. A.; 1898) 88 Fed. 581, 32 C. C. A. 12, *per* Sanborn, Circuit Judge: "The controlling reason for the existence of the right to issue a temporary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during a litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. Undoubtedly an injunction ought not to be issued unless substantial questions of law or fact, whose decision in favor of the moving party would entitle him to ultimate relief, are presented. If it is reasonably clear that he cannot ultimately succeed,—if his pleading discloses no cause of action or defense,—no injunction should be granted. But if the questions to be ultimately settled are serious and doubtful, and if the injury to the moving party will be certain, great, and irreparable if the motion is denied and the final

⁴The decision in this case was re-stated in the principal case. See *Harri*-
versed in the appellate courts but upon man *v. Northern Securities Co.* (1905)
grounds not affecting the principles 197 U. S. 244, 49 L. ed. 739.

decision is in his favor, while, if the decision is otherwise, the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted, it is the duty of the chancellor to issue it. A preliminary injunction, maintaining the *status quo*, may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

§ 2338. Scope of Inquiry Limited to Existing Situation.

On an application for a preliminary injunction, the court is not required to pass on the merits, and usually it would be improper for it to attempt to do so. The question is not as to the final merit, but whether the allegations of the bill and affidavits, if any there be, are sufficient to justify the granting of an injunction *pendente lite*.⁵ Upon motion for a preliminary injunction, the court concerns itself more particularly with what may be called the external situation.⁶

Buskirk v. King (C. C. A.; 1896) 72 Fed. 22, 18 C. C. A. 418: Pending an action of ejectment at law to recover land, the plaintiff filed a bill in equity for an injunction to prevent the defendant from cutting and removing timber. The court of appeals stated the considerations that govern the granting of injunctions in such cases as follows: "Courts of equity are not to be regarded as in any manner forestalling the final action of courts of law on the questions involved when they grant the temporary relief afforded by interlocutory injunctions. In doing so they simply adjudge that the plaintiff presents such a case as justifies the court in preserving the *status quo* until a court of law has had an opportunity, with all the facts before it, and with the assistance of a jury, of determining the real merits of the controversy. In such matters the plaintiff is not required to make out such a case as will entitle him to a decree in his favor on final hearing, and it sometimes happens that he ultimately fails to secure the relief asked for, while, nevertheless, the granting of the preliminary injunction was eminently proper. . . . While it is true that under the ancient rules of courts of equity parties were left to their legal remedies in cases of trespass, it is equally true that at this time the practice prevails of allowing injunctions in such cases where the injury is irreparable. The true foundation of this jurisdiction is the probability of permanent injury to the property in dispute, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits."⁷

⁵ *New Memphis etc. Co. v. Memphis* (1896) 72 Fed. 952; *Cartersville Light etc. Co. v. Cartersville* (1902) 114 Fed. 699. ⁷ *Erhardt v. Board* (1885) 113 U. S. 537, 5 Sup. Ct. 565, 28 L. ed. 1116; *U. S. v. Gear* (1845) 3 How. 120, 11 L. ed. 523.

⁶ *St. Paul etc. R. Co. v. Northern Pac. R. Co.* (1892) 49 Fed. 306, 308, 1 C. C. A. 246.

§ 2339. Considerations Affecting Essential Jurisdiction of Court.

A substantial doubt as to whether the federal court has essential jurisdiction of the suit will justify a refusal on the part of the court to grant a preliminary injunction, though the question of jurisdiction is not primarily under consideration and is left undetermined on such motion.⁸

A preliminary injunction will not be granted where an indispensable party has not been brought in, without whom a decree could not be given on the merits in plaintiff's favor.⁹

§ 2340. Existence of Adequate Legal Remedy.

A preliminary injunction will not be granted where the case stated in the bill is not of equitable cognizance, there being an adequate remedy at law.¹⁰ In such case the plaintiff should sue at law and, if necessary, file a bill solely for an injunction pending the suit at law.

§ 2341. Clear Case for Issuance of Writ Must Be Made Out.

A prerequisite to the allowance of a preliminary injunction is that the plaintiff should show a clear title to relief, or one free from reasonable doubt, and that he should set forth acts done or threatened by the defendant which, if not restrained, will seriously or irreparably injure his rights.¹¹ A preliminary injunction proceeding on the ground of the invalidity of a statute will not be granted unless it is

⁸ Huntington v. City of New York A.; 1901) 106 Fed. 771, 45 C. C. A. (1902) 118 Fed. 683; Farson v. Chicago 611. (1906) 138 Fed. 184; Smith v. Alexander (1906) 146 Fed. 106; Land Co. of New Mexico v. Elkins (1884) 20 Fed. 545 (want of jurisdiction over one defendant sufficient to justify refusal of preliminary injunction); Carson v. Combe (C. C. A.; 1898) 86 Fed. 202, 29 C. C. A. 660. (The question of jurisdiction was said in this case to be of such gravity and vital character that the appellate court refused to pass on it prematurely on an appeal from the interlocutory order, and therefore the injunction was continued.)

⁹ Taylor v. Southern Pac. R. Co. (1903) 122 Fed. 147.

¹⁰ Davidson v. Calkins (1899) 92 Fed. 230.

¹¹ Stevens v. Missouri etc. Co. (C. C. 132 Fed. 614.

A person having a temporary right to the exclusive use of stock exchange quotations cannot obtain an injunction against another to prevent the unauthorized use of those quotations without showing that the alleged illegal user occurs while the plaintiff's exclusive right continues. Board of Trade etc. v. Consol. Stock Exch. (1903) 121 Fed. 433.

A preliminary injunction will not be granted in an infringement case unless the fact of infringement clearly appears. The circumstance that the court of another circuit has adjudged that infringement exists in regard to the same patent, is persuasive. Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co. (1904)

quite clear that the statute cannot stand or that there is great danger of irreparable injury.¹²

As a general principle, suits should be left untrammeled by injunction or decretal orders until the final hearing, except in clear cases of necessity.¹³ A preliminary injunction hurtful to the defendant will not be granted unless it is absolutely necessary to secure the plaintiff in a right not otherwise capable of being adequately protected.¹⁴

Morris v. Bean (1903) 123 Fed. 618: A proprietor who had a prior right to the use of water for irrigating purposes sought to enjoin other proprietors located farther up the stream from diverting the water so as thereby to deprive the plaintiff of his proper supply. A preliminary injunction was refused because the plaintiff's bill did not show that any growing crops were then in need of an immediate supply of water.¹⁵

§ 2342. Showing of Irreparable Injury.

Before an injunction can be issued there must be a showing of violated right, or of threatened violated right, and of definite and tangible injury that will be irreparable.¹⁶ In a suit that contemplates the ultimate recovery of damages as one of its objects, the fact that the defendant is fully responsible financially supplies a reason for refusing an injunction, especially in a case where the granting of it is

¹² *Ryan v. Williams* (1900) 100 Fed. 177. *Moines* (1896) 72 Fed. 829; *Consolidated Fastener Co. v. Traut etc. Co.* (1897) 81 Fed. 383; *Otaheite Gold etc. Co. v. Dean* (1900) 102 Fed. 929; *Central Stock Yards Co. v. Louisville etc. Co.* (1902) 112 Fed. 823; *Montgomery Ward & Co. v. South Dakota etc. Assoc.* (1907) 150 Fed. 413, 418.

¹³ *In Paul Steam System Co. v. Paul* (1904) 129 Fed. 757, the court, speaking with particular reference to the practice prevailing in the Circuit Court for the District of Massachusetts, observed that injunctions *pendentes lite* are refused in that circuit, "unless the case shows beyond reasonable question the necessity for such intervention of the court."

¹⁴ *Seccomb v. Wurster* (1897) 83 Fed. 856, 861.

¹⁵ Further illustrations of situations that have been considered insufficient to justify the granting of a preliminary injunction are found in these cases: *Witman v. Hubbell* (1887) 42 Fed. 633; *Spokane St. Ry. Co. v. City of Spokane Falls* (1891) 46 Fed. 322; *Kimball v. Atchison etc. Co.* (1891) 46 Fed. 888; *Interstate Commerce Commission v. Lehigh Val. R. Co.* (1892) 49 Fed. 177; *Pullman's Palace Car Co. v. Missouri etc. Co.* (1893) 55 Fed. 138; *United States v. Southern Pac. R. Co.* (1893) 55 Fed. 566; *Capital City etc. Co. v. Des*

Moines (1896) 72 Fed. 829; *Consolidated Fastener Co. v. Traut etc. Co.* (1897) 81 Fed. 383; *Otaheite Gold etc. Co. v. Dean* (1900) 102 Fed. 929; *Central Stock Yards Co. v. Louisville etc. Co.* (1902) 112 Fed. 823; *Montgomery Ward & Co. v. South Dakota etc. Assoc.* (1907) 150 Fed. 413, 418.

In New York Ventilator Co. v. American Institute (1885) 24 Fed. 561, the court refused to enjoin the delivery of a medal to one manufacturer upon bill filed by a disappointed competitor, the judging of the award being so entirely within the discretion of the judges.

For conditions under which a preliminary injunction should not be issued in a patent case, see *Whippany Mfg. Co. v. United Indurated Fibre Co.* (C. C. A.; 1898) 87 Fed. 215, 30 C. C. A. 615; *Richmond Mica Co. v. De Clyme* (1898) 90 Fed. 661; *Hall Signal Co. v. General R. etc. Co.* (C. C. A.; 1907) 153 Fed. 907, 82 C. C. A. 663.

¹⁶ *Blindell v. Hagan* (1893) 54 Fed. 40; *Ahern v. Newton etc. Co.* (1900) 105 Fed. 702; *Halstead v. John C. Winston Co.* (1901) 111 Fed. 35.

otherwise of doubtful propriety.¹⁷ But where the plaintiff's right to an injunction is otherwise clearly made out, the solvency of the defendant is immaterial; and the defendant cannot defeat the right to the injunction by tendering security for damages.¹⁸

The title to land being in controversy a preliminary injunction to prevent the defendant from conveying it to one of the states will be granted; for the state not being subject to suit, the title to the property would thereby be irretrievably lost.¹⁹

§ 2343. Injunction Not Grantable on Showing of Doubtful Right.

An injunction will not be granted upon a conflicting and doubtful showing. The remedy is an extraordinary one, and the right to it should be clearly made out.²⁰ The injunction *pendente lite* has been said to be very like an execution before judgment and consequently should be issued only in clear cases of right.²¹ There should be a reasonable certainty that the plaintiff will succeed at the final hearing; and if this is not made to appear, the writ will usually be denied.²² Substantial doubt as to the existence of the right on which the claim to relief is based makes a refusal of a preliminary injunction proper.²³

A preliminary injunction will not be granted where the right to have an injunction depends on an issue that can be properly determined only when full proof is taken.²⁴

§ 2344. Injunction Proper Where Plaintiff's Right Clear.

In the absence of some strong equity to the contrary, the plaintiff is entitled to a preliminary injunction where it is obvious that he

¹⁷ Paine *v.* United States Playing-Card Co. (1898) 90 Fed. 543.

¹⁸ Sickels *v.* Mitchell (1857) Fed. Cas. No. 12,835; Hodge *v.* Hudson R. Co. ed. Fruit Jar Co. *v.* Whitney (1874) Fed. Cas. No. 3,132.

¹⁹ Lee *v.* Simpson (1888) 37 Fed. 12, 2 L.R.A. 659.

²⁰ Parker *v.* Winnipiseogee Lake Cotton etc. Co. (1862) 2 Black 552, 17 L. 33; Irwin *v.* Dixion (1850) 9 How. 33, 13 L. ed. 35; Pennsylvania *v.* Wheeling etc. Bridge Co. (1851) 13 How. 587, 14 L. ed. 278.

²¹ Amelia Milling Co. *v.* Tennessee Coal etc. Co. (1903) 123 Fed. 811.

²² Union Switch etc. Co. *v.* Philadelphia R. R. Co. (1896) 75 Fed. 1004.

²³ American Preservers' Co. *v.* Norris (1890) 43 Fed. 711; Weidenfeld *v.* Allegheny etc. Co. (1891) 47 Fed. 11;

Kilburn *v.* Ingersoll (1898) 67 Fed. (1868) Fed. Cas. No. 6,560; Consolidated 46; De Neufville *v.* New York etc. Co. (1898) 84 Fed. 391; Miller *v.* Morley etc. Co. (C. C. A.; 1898) 87 Fed. 621,

2 L.R.A. 659. 31 C. C. A. 148; Empire Circuit Co. *v.* Jermon (1905) 147 Fed. 532, 534; Home

Insurance Co. *v.* Nobles (1894) 63 Fed. 642; Brooklyn Base Ball Club *v.* Mc- 337; Irwin *v.* Dixion (1850) 9 How. 723. Guire (1902) 116 Fed. 782; Mitchell *v.* Colorado etc. Co. (1902) 117 Fed.

²⁴ Paine *v.* U. S. Playing-Card Co. (1898) 90 Fed. 543; Board of Trade of City of Chicago *v.* C. B. Thomson Commission Co. (1900) 103 Fed. 902.

must prevail on the merits and in the end obtain a final injunction.²⁵ The writ will never be withheld where its issuance is necessary to prevent injustice.²⁶

§ 2345. Doubtful Question of Law.

If doubtful questions of law are raised in a suit and the evidence is conflicting the court will not grant a temporary injunction,²⁷ unless it appears to be desirable for the purpose of maintaining the *status quo* and none other.²⁸ But if, in its general aspects, the bill presents a case of probable right and probable danger thereto, the court may, in its discretion, grant the writ.²⁹

§ 2346. Consideration of Right of Appeal.

The circumstance that no appeal lies from an interlocutory order refusing to grant a preliminary injunction, while on the contrary an appeal does lie from an interlocutory order granting the injunction, is entitled to no weight in a clear case, yet it may conceivably sometimes be allowed some weight in a doubtful situation. Such consideration, so far as it is allowed to operate, makes in favor of the granting of the injunction.³⁰ The consideration in question is never conclusive; and if a plaintiff is clearly not entitled to a preliminary injunction, it will be refused, though the plaintiff has no appeal.³¹

§ 2347. Consideration of Balance of Convenience.

On a motion for a preliminary injunction, it is proper for the court to inquire not only whether serious and irreparable damage will be done to the plaintiff if the temporary injunction is refused, but also to inquire whether or not the defendant, by the granting of the injunction, will suffer injury disproportionately greater.³² It has been truly said that "preliminary injunctions are granted on a balance of convenience."³³ In a case where the issuance of the prelimi-

²⁵ Allington etc. Mfg. Co. v. Booth (C. C. A.; 1897) 78 Fed. 878, 24 C. C. A. 378. ²⁹ New Memphis etc. Co. v. City of Memphis (1896) 72 Fed. 952.

²⁶ Continuous Glass Press Co. v. Schmertz Wire Glass Co. (C. C. A.; 1907) 153 Fed. 577, 82 C. C. A. 587. ³⁰ Harriman v. Northern Securities Co. (1904) 132 Fed. 464, 485.

²⁷ Home Ins. Co. v. Nobles (1894) 63 Fed. 642; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1900) 104 Fed. 32; Mitchell v. Colorado Fuel & Iron Co. (1902) 117 Fed. 723.

²⁸ Cartersville Light & Power Co. v. City of Cartersville (1902) 114 Fed. 669.

³¹ Edison Electric Light Co. v. Buckeye Electric Co. (1894) 64 Fed. 225, 228.

³² Sampson etc. Co. v. Seaver Radford Co. (1904) 129 Fed. 761.

³³ Taft, Circuit Judge, in New England etc. Co. v. Oakwood etc. Co. (1895) 71 Fed. 52.

nary injunction can cause no substantial loss to any one in any event, while the failure to issue it may result in the total loss by the plaintiff of all his right and claim in the subject-matter, the temporary injunction should be issued, unless it be reasonably clear that his alleged ground of action is altogether without any just foundation.³⁴ On the other hand, if it appears that the granting of the injunction would be destructive of the entire business of the defendant or would inflict much damage upon him, while the refusal of it would not seriously affect the plaintiff's rights, the writ will be refused.³⁵ A preliminary injunction that would have the effect of changing the method and system of the defendant and of interfering radically with his business will not be granted except in the clearest sort of a case and where there is some exigency requiring it.³⁶

A preliminary injunction to prevent a sale of property for taxes will be granted almost as of course in a suit plausibly attacking the validity of the law under which the sale is threatened, for the inconvenience and damage that would result to the plaintiff from the creation of a cloud on his title is much greater than the inconvenience that will result to the public authorities from a delay of the sale.³⁷

§ 2348. Adoption of Course Most Conducive to Minimum Injury.

Upon considering the propriety of granting a preliminary injunction, the court will always endeavor so to protect the rights of all the parties to the suit that whatever may be the ultimate decision the injury to each will be reduced to the minimum.³⁸

New Memphis Gas etc. Co. v. Memphis (1896) 72 Fed. 952: Upon application for a preliminary injunction to prevent the putting of a municipal ordinance fixing gas rates into effect, plaintiff's contention being that those rates were unreasonable and confiscatory, the court granted the injunction and observed: "The public can be protected by a bond in a suitable sum, with condition to refund either to the persons who consume gas, or to the taxing district, for the use and benefit of such persons, all sums which may be charged over the rate fixed by this ordinance, in the event plaintiff's bill shall fail. . . . It will not be difficult to thus reimburse fully each purchaser of gas for the excess which may be paid over the rates fixed by the ordinance, if finally sustained, and no serious injury can therefore result to the public, while to refuse the injunction would possibly result in the destruction of the plaintiff's business and property before this litigation can be terminated."

³⁴ *Allison v. Corson* (C. C. A.; 1898) 88 Fed. 581, 32 C. C. A. 12. ³⁷ *Lyon v. Tonawanda* (1899) 98 Fed. 361.

³⁵ *Amelia Milling Co. v. Tennessee etc. Co.* (1903) 123 Fed. 811. ³⁸ *Denver etc. R. Co. v. U. S.* (C. C. A.; 1903) 59 C. C. A. 579, 124 Fed. 159,

³⁶ *Gring v. Chesapeake etc. Canal Co.* (1904) 129 Fed. 996,

§ 2349. Consideration of Injury to Third Person.

The circumstance that a third person may be directly or indirectly injured by the operation of the preliminary injunction, supplies a reason for refusing it which may well be decisive in doubtful cases.³⁹ This consideration is of special force when that third party is the general public.

Stein v. Bienville Water Supply Co. (1887) 32 Fed. 876: The plaintiff claiming to have the exclusive right to supply the inhabitants of a city with water sought to enjoin the defendant company from interfering with its monopoly. Affidavits were filed which tended to show that the city was not being supplied by the plaintiff with such a water supply as the public health and public safety required. In refusing a preliminary injunction Mr. Justice Harlan observed that the discretion of the court in regard to the granting of preliminary injunctions must be exercised so as to avoid possible harm of a serious character to the general public. But an injunction was granted against the doing of injury by the defendant to the plaintiff's mains and conduits.

§ 2350. Injunction to Preserve Status Quo.

The class of cases in which a preliminary injunction will be most readily granted is that where the purpose of the injunction is to maintain the *status quo* until the controverted right is determined. Such an injunction will usually be granted where it appears that the plaintiff has a good *prima facie* cause of action, and without the injunction his suit would be fruitless, even if he should finally win on the merits.⁴⁰ A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great, if it is denied, while the loss or inconvenience to the opposing party will be comparatively small, if it is granted.⁴¹ The court is always disposed to grant the injunction where the denial of it would in effect be a denial of all relief, or where the denial of the injunction would at least subject the plaintiff to the risk of losing all.⁴²

City of Newton v. Lewis (C. C. A.; 1897) 25 C. C. A. 161, 79 Fed. 718: Sanborn, Circuit Judge, in approving of the action of the lower court in granting a preliminary injunction, observed: "To grant the injunction was to preserve the

³⁹ *Foster v. Ballenberg* (1890) 43 A.; 1903) 59 C. C. A. 579, 124 Fed. Fed. 821. 156, 161; *Charles v. City of Marion*

⁴⁰ *Jones v. Dimes* (1904) 130 Fed. (1899) 98 Fed. 106. 638. ⁴² *Africa v. Board etc.* (1895) 70

⁴¹ *Denver etc. R. Co. v. U. S.* (C. C. Fed. 729, 740.

property of all parties *in statu quo*, and prevent substantial damage to any one, whatever the final decree might be, while to refuse it was to permit the immediate destruction of the property of the electric company and the security of the appellee, to allow the infliction of irreparable loss upon them, and to render the suit and its decision useless if the final decree should be in favor of the appellee. There can be no question of the duty of the chancellor to issue an injunction under such circumstances. The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great, and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be incon siderable, and may well be indemnified by a proper bond, if the injunction is granted. A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted.”⁴³

A preliminary injunction will in no case be granted where it is manifest that the *status quo* will be preserved without the aid of such injunction. In such case there is no danger of any irreparable injury to the plaintiff and the court is not called upon to exercise any extraordinary power.⁴⁴

§ 2851. Case Where Injunction Determinative of Whole Controversy.

As a rule, the court of equity is averse from interfering by means of an injunction to change an existing state of affairs where the circumstances are such that its action in granting the injunction will, in practical effect, decide the whole controversy in favor of the plaintiff. For instance, if a controversy arises among the stockholders of a corporation, and a minority of the stockholders seek an injunction to prevent the majority from voting shares held by them, at an impending

⁴³ *Accord, Blount v. Société Anonyme Southern Pac. Co. v. Earl* (1897) 82 du Filtre (1892) 6 U. S. App. 335, 3 C. Fed. 690, 27 C. C. A. 185; *Indianapolis C. A.* 455, 53 Fed. 98; *Jenson v. Norton* Gas Co. v. Indianapolis (1897) 82 Fed. (1894) 29 U. S. App. 121, 12 C. C. A. 245; *Allison v. Corson* (1898) 88 Fed. 608, 64 Fed. 662; *Dooley v. Hadden* 581, 32 C. C. A. 12; *Sanitary Reduction* (1896) 72 Fed. 952; *Buskirk v. King* Works v. California Reduction Co. 494, 74 Fed. 429; *Georgia v. Brailsford* (1899) 94 Fed. 693; *Denver & R. G.* (1791) 2 Dall. 402, 1 L. ed. 433; *New R. Co. v. United States* (1903) 124 Fed. Memphis Gas & Light Co. v. Memphis 156, 59 C. C. A. 579. ⁴⁴ *Miller v. Mutual etc. Ass'n* (1901) (1896) 72 Fed. 22, 18 C. C. A. 418; 100 Fed. 278.

stockholders' meeting, the court will not grant the injunction and thereby in effect turn the corporation over to the minority stockholders; for this would operate to give them all the benefit of a final adjudication in their favor.⁴⁵

But if the plaintiff's right is clear, the court will not be deterred from granting an injunction merely because the effect of it will be a virtual determination of the suit. This is frequently illustrated in suits for an injunction against strikers. Though the preliminary injunction would obviously break the strike and leave practically nothing else to litigate about, it will yet be granted where the acts enjoined are plainly unlawful and, if continued, would work irreparable damage. Advertence to the circumstance that such an injunction does operate to break up the strike increases the responsibility of the court in such cases and imposes on it the duty of seeing that the injunction shall not be issued except in accordance with law and right.⁴⁶

§ 2352. Injunction to Prevent Entry of Landlord.

Owing to the estoppel of a tenant to question the title of his landlord, the former will not be granted a preliminary injunction to prevent an ouster at the termination of the lease, upon any ground that tends to impeach the landlord's title. And if notice to quit has been properly given and the right of the landlord to re-enter is clear, the circumstance that the tenant will be greatly injured by the entry does not justify a preliminary injunction to postpone it. If the court can see that the tenant clearly has no case, it will not interfere to prevent his ejection.⁴⁷

§ 2353. No Injunction against Accomplished Act.

As the action of the court in granting a preliminary injunction depends, or should depend, on the situation at the time the application is considered and acted upon, the writ will not be granted where it would obviously prove a *brutum fulmen*, as for instance, where the act against which it would be directed has already been done.⁴⁸ In a case where the United States filed a bill to prevent a foreign telegraph company from landing and laying its cable on the shores of this coun-

⁴⁵ *Taylor v. Southern Pac. Co.* (1903) *sylvania R. Co.* (1903) 120 Fed. 362
122 Fed. 147, 155. (1903) 59 C. C. A. 113, 123 Fed. 33.

⁴⁶ *American Steel etc. Co. v. Wire Drawers' Union* (1898) 90 Fed. 603. ⁴⁸ *Mexican Ore Co. v. Mexican Guadalupe Min. Co.* (1891) 47 Fed. 351.

⁴⁷ *Western Union Tel. Co. v. Penn.*

try, without the consent of the government, a preliminary injunction against the operation of the service was refused, because it appeared that the cable had been landed before the motion for a preliminary injunction was heard, and nothing was shown to indicate that irreparable injury would result from its operation upon the final hearing.⁴⁹

§ 2354. No Injunction Where Defendant Has Ceased Wrongful Acts.

A preliminary injunction will not be granted unless injury is being committed or threatened. If the defendant appears already to have desisted from his wrongful act and there is no reason to suppose that the injury will be repeated, the injunction will be refused.⁵⁰ But it has been ruled that "a naked and unsupported promise" on the part of a defendant to desist from his wrongful acts is not enough to justify a refusal of the injunction.⁵¹

§ 2355. Miscellaneous Considerations Affecting Right to Injunction.

The circumstance that the United States cannot be required to give an injunction bond supplies a reason why, in suits brought in its name, the extraordinary relief by preliminary injunction should be refused in all doubtful cases, especially where the defendant would be financially hurt and embarrassed by such injunction.⁵²

The suggestion, not infrequently advanced by parties desiring to obtain an injunction, that "there is nothing in the injunction that would interfere with an honest man conducting his business unhampered by any restriction" is not enough to justify the issuance of a preliminary injunction where no clear right thereto is shown. The fact that the mere issuance of an injunction would stigmatize the defendant by indicating that he had done or threatened to do some unlawful act is an argument against issuing it.⁵³

In a suit by a stockholder to enjoin the doing of corporate acts alleged to be *ultra vires*, it has been observed that the right of the plaintiff to a preliminary injunction is prejudiced by the circumstance that he appears to have acquired his interest as a stockholder merely for the purpose of attacking the transaction in question. Such a plaintiff can insist only upon such preliminary relief as is abso-

⁴⁹ *United States v. Compagnie Francaise* (1896) 77 Fed. 495.

⁵⁰ *Home Ins. Co. v. Nobles* (1894) 63 Fed. 642.

⁵¹ *Celluloid Mfg. Co. v. Arlington Mfg. Co.* (1888) 34 Fed. 324.

Eq. Prac. Vol. II.—87.

⁵² *United States v. Jellico Mountain etc. Co.* (1890) 43 Fed. 898.

⁵³ *International Register Co. v. Recording Fare R. Co.* (C. C. A.; 1907)

80 C. C. A. 475, 151 Fed. 199,

lutely indispensable to preserve his rights. "The purchaser of a law-suit is entitled to what he has bought."⁵⁴

The Mandatory Injunction.

§ 2356. Injunction Looks to Prevention of Future Injury.

The preliminary injunction is primarily a conservative and not a remedial instrument. Consequently it will not ordinarily be given a retroactive or restorative effect, that is, it will not be used to compel the undoing of that which has already been done. The prime function of the writ is to preserve the *status quo*; and while it may properly be used to prevent a disturbance of property, it cannot ordinarily be permitted to operate so as to require a restoration of property to the condition it was in prior to a disturbance already effected. Preservation of the *status quo* does not mean restoration to the *status quo* existing before the interference.⁵⁵ In other words, the mandatory feature will not ordinarily be ingrafted on a preliminary injunction.

Southern Pac. R. Co. v. Oakland (1893) 58 Fed. 50: The city claimed title to premises occupied by the railroad, and in assertion of its title the officials of the city entered on those premises and caused the railroad track to be partly torn up. The railroad brought suit to quiet its title and to enjoin further trespasses. The court granted a preliminary injunction against future trespasses but refused to require the city to restore the track.

§ 2357. When Injunction Not Objectively Mandatory.

But an injunction is not technically a mandatory injunction, at least not in any objectionable sense, merely because the defendant, in order to comply with it, is bound to take some positive step or other. Thus, where the usual course of business has been improperly interrupted and an injunction is obtained to prevent the continuance of such interruption and to restore business to its usual course, the circumstance that the defendant must perform some minor positive acts in restoring affairs to their former course does not make the injunction mandatory in an objectionable sense.⁵⁶

⁵⁴ *DuPont v. Northern Pac. R. Co.* ⁵⁵ *Fairchild Floral Co. v. Bradbury* (1883) 18 Fed. 467, 21 Blatchf. 534. (1898) 87 Fed. 415. *Compare In re*
⁵⁵ *Southern Pac. R. Co. v. City of Lennon* (1897) 166 U. S. 548, 41 L. ed.,
Oakland (1893) 58 Fed. 50. But see 1110, 17 Sup. Ct. 658,
Chattanooga Terminal Ry. Co. v. Felton (1895) 69 Fed. 273, 283.

§ 2358. Power of Court to Grant Mandatory Injunction—Illustrations.

Upon principle there is no difference between the authority of the court in respect to the granting of mandatory injunctions, either final or interlocutory, and its authority in regard to the granting of purely prohibitory injunctions. The courts do indeed display hesitancy about granting mandatory injunctions, but this arises from the consciousness that, in requiring an affirmative act to be done, the court is undertaking to insist on the doing of something that it cannot always be sure will be rightly done. But wherever the exigency requires it, and the situation is such as to make the order practicable, the mandatory injunction will be granted.⁵⁷ The mandatory character of an injunction is often cloaked under the outward form of a purely prohibitory injunction;⁵⁸ and perhaps in this way alone has the mandatory injunction obtained a legal footing. However, this no longer holds, and a mandatory injunction that is affirmative on its face may be granted if necessary.

1. *Cole Silver Mining Co. v. Virginia etc. Co.* (1871) 1 Sawy. 470, 465: The plaintiff had used for many years in its mining operations a flow of water from a subterranean stream. The defendant put a tunnel through the mountain from a distant point, which tunnel came within about thirty feet directly under the spot where the plaintiff got its water. This tunnel tapped and drained the stream in question, with the result that the defendant appropriated and diverted all the water, so that the plaintiff was deprived of it. The plaintiff thereupon filed a bill to restrain the diversion, and on motion an interlocutory injunction was granted requiring the defendant to desist from continuing to divert the water. The injunction was affirmative and mandatory in respect of the fact that, before it could be complied with, it was necessary for the defendant to build a water-tight barrier across the tunnel or even to fill up the tunnel.

It was argued for the defendant that the diversion was already committed and that the court should not, by a mere interlocutory order, undertake to restore the parties to their former position. Sawyer, J., admitted that authority could be vouchered for such position, but he pointed out that any unlawful interference that is, in its nature, a continuing offense can be enjoined by a restrictive order, and the circumstance that the order incidentally calls for and requires some affirmative act is no objection to it. The action of this judge was afterwards approved by Field, Circuit Justice.

⁵⁷ See *Mills v. Green* (1895) 159 U. S. 654, 40 L. ed. 294.-

⁵⁸ An injunction which prohibits a railway company from charging an express company excessive rates and from thereby preventing it from carrying on business over that road, and which re-

quires the railroad to accept the packages of the express company at the same rates as are charged to other express companies, is mandatory and affirmative in form. *Southern Express Co. v. Memphis etc. R. Co.* (1881) 8 Fed. 799,

Z. Cee v. Louisville etc. R. Co. (1880) 3 Fed. 775: The defendant railroad company had, for more than twelve years, been delivering stock on a switch at the plaintiff's stockyard, the same being connected with the railroad by gaps and pens. A new stockyard company was established in another part of the city, and the railroad entered into a contract with this new company whereby it agreed that all cattle shipped to the city and over the road should be delivered at the premises of this stockyard company and not elsewhere. This necessarily involved a discontinuance of the delivery of stock to the plaintiff at his yard as was formerly the custom. A preliminary injunction was granted requiring the company to continue delivering stock to the plaintiff at his yard. The court observed that such a mandatory preliminary injunction ought not to be granted unless the rights of the parties were free from reasonable doubt and the urgency of the case demanded it.

§ 2359. Nature of Equity Justifying Mandatory Injunction.

The equity that will justify the granting of a mandatory injunction must be much better defined and much more cogent than that which will justify the granting of a prohibitory injunction.

Vicksburg v. Waterworks Co. (1906) 202 U. S. 453, 471, 50 L. ed. 1102, 1112: A waterworks company was found to be entitled to a prohibitory injunction restraining a city from making sewer connections with a drainage course that emptied into the plaintiff's source of supply above the intake of water. But on the same facts it was held that the plaintiff was not entitled to a mandatory injunction requiring the city to extend its sewer and construct an outlet therefrom so as to discharge the sewage below the intake. The prohibitory injunction was adequate to protect the plaintiff's water from pollution; and as to the mode in which the city was to accommodate itself to the requirements of the prohibitory injunction, this matter was held to be one to be determined by the city authorities in the exercise of the official discretion vested in them.

§ 2360. Use of Mandatory Injunctions to Regulate Traffic.

The function and scope of the mandatory preliminary injunction is well illustrated in controversies that have arisen between connecting railroads. Thus, if one railroad refuses to receive and transport the cars of a connecting road, the latter road may obtain a prohibitory and mandatory injunction compelling the defendant road to discontinue its obstructive policy and to receive and transport those cars.⁵⁹

Toledo etc. R. Co. v. Pennsylvania Co. (1898) 19 L.R.A. 397, 54 Fed. 730: In this case Taft, Circuit Judge, noted that the normal condition—the *status quo*—between connecting carriers is the continuous passage of freight backward and forward between them, which each carrier has a right to enjoy without interrup-

⁵⁹ *Denver etc. R. Co. v. Atchison etc. Fed. 516; Chicago etc. R. Co. v. Bur-R. Co. (1883) 15 Fed. 650; Chicago etc. linington etc. R. Co. (1888) 34 Fed. 481. R. Co. v. New York etc. Co. (1885) 24*

tion. The learned judge compared this right to that which the riparian owner enjoys in regard to the continuous and uninterrupted flow of a stream of water, and he observed that preliminary mandatory injunctions had long been in vogue as a means for removing obstructions in the flow of water. "So," said he, "an obstruction to the flow of interstate freight must be preliminarily enjoined, even though it requires a mandatory injunction. The quasi-public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result are ample grounds for this."

§ 2361. Mandatory Injunction as Incident to Prohibitory Injunction.

A court of equity will not hesitate to require affirmative action of a defendant in so far as such an order may be necessary to effect the purpose and object of the inhibitive injunction; that is, an injunction will be given a mandatory feature where this is desirable in order to carry out the prohibitive feature.⁶⁰ Similarly, a preliminary mandatory injunction may be issued as an auxiliary process to remove any obstruction to the carrying into effect of a prior prohibitory injunction in chief, the same being necessary to secure the enforcement of such previous order.⁶¹

⁶⁰ *In re Lennon* (1897) 166 U. S. 556, any order to the members of the Brotherhood that would obstruct the effect of 41 L. ed. 1113.

⁶¹ Thus in a case where one railroad had obtained a preliminary injunction restraining another railroad from refusing to haul the plaintiff's cars, and afterwards the chief of the Brotherhood of Locomotive Engineers was made a party to the suit, a mandatory injunction was issued to enjoin him from continuing in force, or what was the same in effect, to compel him to rescind, A. 79.

CHAPTER LVIII.

INJUNCTIONS (*continued*).

Terms Incident to Granting or Withholding Injunction.

- § 2362. Imposition of Terms on Plaintiff—Bond.
- 2363. Requiring Additional Security.
- 2364. Terms Incident to Withholding Injunction.

Issuance and Scope of Injunction.

- 2365. Fiat for Issuance of Injunction.
- 2366. Form and Contents of Writ.
- 2367. When Issuance of Formal Writ Necessary.
- 2368. Notice of Injunction.
- 2369. Notice of Giving Bond.
- 2370. Delay of Plaintiff to Procure Writ or Serve Notice.
- 2371. Scope of Injunction.
- 2372. Scope of Writ as Affected by Allegations of Bill.

Against Whom Operative.

- 2373. Defendants, Agents, and Confederates.
- 2374. Injunction against Others than Parties to Suit.
- 2375. New Defendants Brought in by Leave.
- 2376. Corporation Officer.
- 2377. Substitution of Successor in Estate.
- 2378. Effect of Injunction against Agent.
- 2379. Liability of Party for Act of Minor Child.
- 2380. Extraterritorial Operation of Personal Injunction.

Interpretation of Injunctions and Injunctional Orders.

- 2381. Injunction Construed with Reference to Its Intent.
- 2382. Construction of General Words.

Appeal from Order Granting Injunction.

- 2383. Statutory Right of Appeal.
- 2384. Suspending Injunction Pending Appeal.
- 2385. Case Presented on Appeal.
- 2386. Reviewing Discretion of Lower Court.
- 2387. Review of Injunction Granted by Court of Ancillary Jurisdiction.
- 2388. Modification of Injunction by Appellate Court.
- 2389. Making of Terms by Appellate Court.

*Terms Incident to Granting or Withholding Injunction.***§ 2362. Imposition of Terms on Plaintiff—Bond.**

The granting of an application for a preliminary injunction being a matter within the discretion of the court, it is entirely competent and proper for the court, in passing upon such application, to impose terms upon either of the parties. For instance, the court will always require the plaintiff to do equity, and he is usually required to give a bond with good security to indemnify the defendant against loss from the wrongful suing out of the writ.¹ The requirement of a bond is discretionary both as to the giving of the bond and its amount;² and if it sees fit to do so, the court can order the injunction to issue without any bond at all.³

Russell v. Farley (1881) 105 U. S. 438, 26 L. ed. 1061: The supreme court here had under discussion the subject of the power of the court of equity to impose terms upon a party in whose behalf a preliminary injunction is granted. Reference was made to the circumstance that in courts of equity in many of the states the power to impose terms was expressly sanctioned by statutes. "But," said the court, "no act of Congress or rule of this court has ever been passed or adopted on this subject. The courts of the United States, therefore, must still be governed in the matter by the general principles and usages of equity."⁴

Proceeding thereupon to expound the ground of this equitable power, the court said: "If the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is *damnum absque iuris*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial."

That an injunction bond bears a date prior to the granting of the order is no objection to its validity, as it takes effect only on being filed and upon justification of the sureties.⁵

¹ *Meyers v. Block* (1887) 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. 525; ³ *Montana Co. v. St. Louis Min. etc. Co.* (1894) 152 U. S. 170, 38 L. ed. 400. ⁵ *Briggs v. Neal* (C. C. A.; 1903) 56 C. A. 572, 120 Fed. 224. ⁴ 105 U. S. 441, 26 L. ed. 1063.

² *West v. East Coast Cedar Co.* (C. Union (1906) 149 Fed. 580. ⁶ *Hammond Lumber Co. v. Sailors' C. A.; 1902) 51 C. C. A. 416, 113 Fed. 742.*

§ 2363. Requiring Additional Security.

After the sureties on an injunction bond have been accepted, the court will, on motion, require additional or different security to be given, if it is made to appear that the sureties previously accepted are not good and solvent.⁶ An injunction bond may be increased where it becomes manifest that, owing to the prolongation of the litigation, the damages covered by the bond will be greater than the amount of the original bond.⁷

By moving to dissolve an injunction, a party does not waive his right to object to the sufficiency of the sureties on the bond. The motion to justify the sureties or to require additional security may be heard simultaneously with a motion to dissolve.⁸

§ 2364. Terms Incident to Withholding Injunction.

As the court has power to impose terms on the plaintiff as a condition of the granting of the injunction, so may it impose terms on the defendant as a condition of withholding the injunction, as for instance, by requiring the defendant to give a bond or to comply with some other reasonable condition;⁹ and it may be laid down as a general principle that an injunction should always be withheld where terms can be arranged that will at once adequately protect the plaintiff and at the same time operate less prejudicially to the defendant than would the granting of an injunction.¹⁰ The circumstance that the impending or threatened injury may be adequately compensated in money is a good reason for refusing a preliminary injunction where the issuance of it would embarrass the defendant and inflict considerable loss on him. But the defendant may be required to give bond as a condition for withholding the injunction, a good case for injunction being otherwise made out.¹¹

*Issuance and Scope of Injunction.***§ 2365. Fiat for Issuance of Injunction.**

If the court or judge to whom an application for a preliminary injunction is made deems that a sufficient showing has been made to

⁶ Goldmark v. Kreling (1885) 25 Fed. 349. give bond for the payment of such damages as might finally be recovered

⁷ Tampa Waterworks Co. v. City of Tampa (1903) 124 Fed. 932. against him, and should also agree to keep an account of sales. Sampson etc.

⁸ Goldmark v. Kreling (1885) 25 Fed. 359. Co. v. Seaver-Radford Co. (1904) 129 Fed. 761, 773.

⁹ In a copyright suit the court was inclined to think that the plaintiff was entitled to a preliminary injunction, nevertheless the same was denied on the condition that the defendant should

¹⁰ Kansas etc. R. Co. v. Payne (C. A.; 1892) 1 C. C. A. 163, 49 Fed. 114.

¹¹ Rainey v. Baltimore etc. R. Co. (1883) 15 Fed. 767.

justify the issuance of the writ, he thereupon grants his fiat for the injunction. This is nothing more than an order that the writ may be made and issued in conformity with the prayer of the bill or in conformity with the limitations and conditions stated in the fiat itself; and the fiat is construed with reference to the prayer and object of the bill upon which it is granted.¹² If it be compatible with the nature of the remedy to issue the writ on a condition subsequently to occur, that condition should be incorporated in the order, or appear upon the face of the process. It cannot be left at the option and control of the party obtaining the order.¹³

In granting the fiat for an injunction, the court should take care to impose such terms as will enable the writ to operate justly and to prevent any unnecessary damage being done by the use of the writ. Exceptional care should be taken in regard to limiting the operation of the writ in cases where the court sees fit to grant the fiat without requiring the plaintiff to execute a bond.¹⁴

§ 2366. Form and Contents of Writ.

The formal writ of injunction, which is issued upon the authority of the fiat, is usually drawn up by the clerk of the court in conformity with the fiat and with due reference to the case made in the bill and the prayer for injunction contained in it. But of course in important or delicate cases, the terms of the injunction should be settled by the court as in case of decrees, especially if any dispute arises as to the provisions proper to be inserted in the injunction. No particular form is requisite for the writ, it being sufficient if the defendant is given an authentic notification of the mandate he is required to obey. The writ should be sufficiently explicit on its face to apprise the defendant of what he is restrained from doing, without compelling him to resort to the bill to ascertain what the injunction means.¹⁵ But where the writ refers to the bill, and the defendant has knowledge of its contents, and the meaning of the injunction is obvious, he cannot insist that the injunction is vague and uncertain.¹⁶

§ 2367. When Issuance of Formal Writ Necessary.

As regards the necessity for the issuance of a formal writ of injunction, a distinction must be drawn between two well-defined classes of

¹² *Hamilton v. State* (1869) 32 Md. 352. ¹⁵ Gibson, *Suits in Chan.* (2d ed.) 834.

¹³ *McCormick v. Jerome* (1856) 3 Blatchf. 496. ¹⁶ See *Whipple v. Hutchinson* (1858) 4 Blatchf. 190.

¹⁴ Gibson, *Suits in Chan.* (2d ed.) 829.

cases. The first is that in which the writ of injunction comprises the effectual order and decree of the court, and is itself the evidence of such decree or order. The other is that in which the writ of injunction is only used as a vehicle by which to convey to the defendant a knowledge of the injunctive order or decree of the court already entered on the record in the cause. To illustrate: When a preliminary application is made to a judge, and he grants his usual fiat for the issuance of a preliminary injunction or restraining order, the issuance of the formal writ is absolutely necessary, for apart from the writ itself there is no injunctive order or decree that could be considered binding on the defendant. On the other hand, where a motion for an injunction *pendente lite* is brought before the court by motion in usual course, both parties being present or represented by counsel, and the court decides to grant the injunction, it has ample power to enter an interlocutory order of injunction that will be binding on the defendant from the time it is granted; for being in court, and being a party to the suit, the defendant has knowledge of all decrees and orders properly entered in the cause, and he must therefore be considered as being bound by the injunctive order. In such case the issuance of a formal writ of injunction in pursuance of the injunctive order and in conformity with its terms is not necessary. However, it is not unusual in actual practice for the writ to be issued, in such cases, as a matter of form; and this practice is not a bad one, for in the formal writ it may be convenient to define, with greater particularity than in the injunctive order, the acts that the defendant is enjoined from doing.¹⁷

§ 2368. Notice of Injunction.

Prompt notice of the granting of the injunction and of its terms should be served on the party enjoined and his attorney if they can be reached.¹⁸ However, to render a person amenable to an injunction, it is not necessary that he should be actually served with a copy of the injunctive order or with a copy of the writ. If he receives actual notice of the granting of the injunction and of its terms, this is enough, in whatever way such notice may have been given.¹⁹ But

¹⁷ The actual issuance and service of a formal writ of injunction or of a restraining order are not necessary, where the order of the court specifies the prohibited acts and a certified copy of such order is served. *Hammond Lumber Co. v. Sailors' Union* (1906) 149 Fed. 580. ¹⁸ *In re Cary* (1882) 10 Fed. 622. ¹⁹ *Ex parte Lennon* (1897) 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. 658; *Christensen Engineering Co. v. Westinghouse Air Brake Co.* (C. C. A.; 1905) 68 C. C. A. 476, 135 Fed. 774, 777; *Pope Motor Car Co. v. Keegan* (1906) 150 Fed. 148, 151; *Ex p. Richards* (1902) 117 Fed.

those who procure an *ex parte* injunction, and make no effort to serve it upon the persons who they claim shall be bound by it, though they are easily accessible, are not entitled to proceed for contempt upon any accidental, doubtful, and disputed notice of the injunction alleged to have been conveyed indirectly through other persons.²⁰

§ 2369. Notice of Giving Bond.

If the order granting an injunction is conditioned to be effective when the plaintiff shall give bond, and such bond is subsequently given, the defendant is chargeable with notice of the giving of the bond; and if he does the prohibited act after that time, he is guilty of contempt. Notice of the giving of the bond is not necessary to bind him, unless the order should provide for such notice to be given.²¹

§ 2370. Delay of Plaintiff to Procure Writ or Serve Notice.

If the party in whose favor a fiat for an injunction is granted fails to sue out the writ and procure it to be served, or fails to cause notice to be otherwise given, within a reasonable time, he thereby abandons and waives his claim to injunctive relief; and if the issuance of the writ is afterwards procured by him, the person enjoined will not be punished for a violation of it. It has been held that the lapse of one year between the granting of the order and service of notice of the injunction is sufficient to render the writ ineffectual.²²

§ 2371. Scope of Injunction.

The order granting the injunction should be drawn with precision and with due regard to the extent of protection to which the plaintiff is entitled, without undue interference with the rights of the person who is restrained. Both parties are to be dealt with in the same spirit of fairness and impartiality.²³ Neither should be given any undue advantage over the other.

Northern Pac. R. Co. v. Spokane (1892) 52 Fed. 428, 430: The railroad had created a warehouse on a spot alleged by the city to be in a public street, and the city threatened to demolish it. There was also a controversy as to whether the premises were within the fire limits or not, and so subject to the order of the city

²⁰ *Ulman v. Ritter* (1896) 72 Fed. 1000; *In re Feeny* (1870) Fed. Cas. No. 4,715. ²² *McCormick v. Jerome* (1856) 3 Blatchf. 486, Fed. Cas. No. 8,721.

²¹ *In re Cary* (1882) 10 Fed. 622, 627. ²³ *Marble Co. v. Ripley* (1870) 10 Wall. 339, 354, 19 L. ed. 955.

Burr v. Kimbark (1887) 29 Fed. 428, 430.

as to that kind of an erection. The court granted an injunction against the city as to the removal of the warehouse, but so modified the order as not to preclude the city from requiring an inspection of the plans for the erection of any new building. Said the court: "The order should be limited so as to simply preserve the *status quo*, and should not give either party any advantage by proceeding in the acquisition or alteration of property, the right to which is disputed, while the hands of the other party are tied."

An order of injunction should be sufficiently extensive to protect the right of the plaintiff that the defendant is violating. The appellate court will not modify an injunctive order, even though it trenches upon delicate ground and goes to the verge of discretion, where it is plain that no substantial right of the defendant is thereby invaded. Though the court should keep injunctions within their legitimate scope, loopholes should not be left whereby the defendant can defeat the purpose of the injunction; and where it is plain that the defendant is seeking to do this, the court will not strain conclusions to assist him.²⁴

§ 2372. Scope of Writ as Affected by Allegations of Bill.

The injunction must not be given a broader scope than the case made in the bill.²⁵ But it is not necessary that the language of the injunction or injunctive order should literally or strictly follow the language of the bill. An injunction is not too broad though it describes in general terms the acts particularly set forth in the bill as wrongful.²⁶

An injunction may be broadened upon the filing of a supplemental bill enlarging the case made in the original bill.²⁷

Against Whom Operative.

§ 2373. Defendants, Agents, and Confederates.

A preliminary injunction should be so drawn as to be operative against all persons whom it is desirable to bring within the compass of the order, and they should be either named or described in apt words. An injunction may be made to run against the defendant, his counsel, agents, and servants and all persons in privity or con-

²⁴ *Evenson v. Spaulding* (C. C. A.; 1907) 9 L.R.A. (N.S.) 904, 82 C. C. A. 203, 150 Fed. 523. ²⁶ *Economist Furnace Co. v. Wrought-Iron Range Co.* (1898) 86 Fed. 1010, 1012.

²⁵ *Hammond Elevator Co. v. Chicago* (C. C. A.; 1905) 74 C. C. A. 430, 143 Fed. 292. ²⁷ *Parkhurst v. Kinsman* (1848) Fed. Cas. No. 10,700.

federating with him.²⁸ This is the usual form of the writ of injunction to prevent waste, trespass, or the continuance of a nuisance. And a preliminary mandatory injunction will be made so to run as well as the prohibitory injunction.²⁹

United States v. Elliott (1894) 64 Fed. 27, 35: In a suit to enjoin a combination in restraint of interstate commerce that was being put into effect by strikers, a preliminary injunction was granted, which recited that it should be binding on the defendants named in the bill and also "upon such defendants whose names are not stated but who are within the terms of this order." It was further ordered that the injunction should be operative upon all persons acting in concert with the designated conspirators, and under their direction and control, and where parties were not named especially in the writ, but were found to be acting in concert with and under the direction of the alleged conspirators, and committing some act in furtherance of the conspiracy, then the marshal should serve the writ upon them, and if, after service of the writ upon them, they did any act in violation of the injunction, they would come within the terms of the order. It was insisted that this injunction was objectionable because it went against parties not named specifically in the bill and in the order. But the objection was overruled, the court saying that such an order was conformable to the usage of the equity court, and inasmuch as the injunction was not to become operative on any one until he should be served with a copy of the writ, the regularity of the order was unquestionable.

Bringing a bill against certain named defendants, "their confederates, associates, agents, and servants," does not make any others than such as are specifically named actual parties to the bill in the full sense. The purpose of specifying confederates and other associates in general terms is to enable the court to punish them for contempt, in case of a wilful violation of the injunction, or to allow them to be brought in and bound by the decree when their names are ascertained. Persons thus generally described are not technical parties.

In re Richards (1902) 117 Fed. 658: During a miners' strike, the plaintiff, a colliery company, obtained an injunction against disturbances of a certain character. The bill ran against the defendants who were specifically named and their unknown confederates, agents, servants, etc., and the prayer for process ran in

²⁸ *Chattanooga Terminal Ry. Co. v. defendant and "all other persons"* has been held effective as against one having no Felton (1895) 69 Fed. 273, 285.

A form of the injunction granted in a labor dispute to prevent picketing and other unlawful interferences with the plaintiff's business, is given in *Allis-Chambers Co. v. Iron Moulders' Union* (1870) 150 Fed. 153, 161.

²⁹ *Toledo etc. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 387, 54 Fed. 742.

the same form. Subsequently, certain persons were brought up for contempt as confederates, aiders, and abettors of the defendants. The residence of these individuals was such that if they had been made original parties to the suit, or if they could be considered as being actual parties under the general term "confederates," the court would have had no jurisdiction of the cause. It was held that they were not parties in this sense.

Yet for all purposes of punishing them for contempt in the violation of the injunction, such persons are treated the same as actual parties. "They are in effect parties to the cause, at least in the same situation as a named party, so far as concerns a violation of the order."⁸⁰

§ 2374. Injunction against Others than Parties to Suit.

Although the court of equity has ample power to extend an injunction, preliminary or final, to parties other than those actually of record, it will not exercise such power unless this course seems to be necessary. To justify such an extension of the injunction there should be some showing of a conspiracy or joint action between the defendants and the other parties, or it should appear that the defendants named represent those not named.

Scott v. Donald (1897) 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. 262: The dispensary law of South Carolina appearing to be unconstitutional in a certain aspect, the court below granted a preliminary injunction restraining the defendants, officers of the state, from seizing and carrying away under color of that law spirituous liquors brought into the state by the plaintiff. The injunction was so framed as to extend to "all other persons claiming to act as constables, and all sheriffs, policemen, and other officers, acting or claiming to act under said dispensary act." The supreme court disapproved of this feature of the injunction and modified it accordingly. Said the court: "This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties. The acts complained of are tortious, and do not grow out of any common action or agreement between constables and sheriffs of the state of South Carolina."

§ 2375. New Defendants Brought in by Leave.

It is often desirable that the bill, after charging the existence of a confederacy or conspiracy between the defendants and unknown parties, should ask leave to make such individuals actual defendants when their names are discovered. The final decree can then be drawn

⁸⁰ Employers' Teaming Co. v. Team. 686; *Ex p. Richards* (1902) 117 Fed. 658; *Employers' Joint Council* (1905) 141 Fed. 679, 658.

so as to reserve the right to bring in future parties and bind them by the decree at any time. This procedure is especially appropriate where the bill seeks permanent injunctive relief.³¹

§ 2376. Corporation Officer.

An injunction against a corporation usually runs against the corporation, its officers, and agents.³² But it is not necessary that the officers of a corporation should be made technical parties defendant in order to make the injunction binding on them; for if the injunction is granted, the officers are bound to respect it anyway.³³

§ 2377. Substitution of Successor in Estate.

A party who, pending the suit, succeeds to the title, office, or estate of one of the original defendants, may be substituted on motion or he may be brought in and made a party defendant by a supplemental bill. Where this is done the preliminary injunction will be extended so as to include him within its operation.³⁴

§ 2378. Effect of Injunction against Agent.

One who, being a party to the suit, is enjoined from doing a particular act cannot do that act as the servant of another person who is not enjoined. But one who, not being a party, is enjoined from doing an act as servant is not thereby disabled from doing that act when the relation of service does not exist. In other words, the restraint laid on an agent, servant, or employee, restrains him only by reason of the relation of service and not personally.³⁵

§ 2379. Liability of Party for Act of Minor Child.

A party upon whom an injunction is laid will be held liable for a violation thereof by his own minor son where it appears that the wrongful act was done by his authority express or implied; and if the boy is still under the parental control, the father will be liable if he

³¹ *Chisolm v. Caines* (1903) 121 Fed. (1902) 116 Fed. 381; *Fanshawe v. Tracy* 398. In this case it was also held that (1888) 4 Biss. 490, Fed. Cas. No. 4,643; other parties could subsequently be held *Phillips v. Detroit* (1877) 3 Flipp. 92, liable upon contempt proceedings for wilful violation of the injunction, though etc. R. Co. (1868) Fed. Cas. No. 6,204. no confederacy with the actual defendant. ³⁴ *Prout v. Starr* (1903) 188 U. S. 537, ants was alleged as to them or appeared. 23 Sup. Ct. 398, 47 L. ed. 584.

³² *Toledo etc. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 387, 54 Fed. 742, Fed. 784, ³⁵ *Dadirrian v. Gullian* (1897) 79 ³³ *Sidway v. Missouri Land etc. Co.*

knows about the contemplated act or conduct and fails to exert his paternal authority to prevent it.³⁶

§ 2380. Extraterritorial Operation of Personal Injunction.

An injunction can be made operative beyond the territorial jurisdiction of the court. Thus, if the party enjoined is within the jurisdiction, he is bound to obey the injunction, though it relates to the doing of some act abroad, such as the conveyance of land or the institution of a suit in a foreign court.³⁷ Since the injunction operates *in personam*, it is immaterial, in a case where personal control over the defendant is alone desired, whether the subject-matter of the suit lies within the jurisdiction or not.³⁸

Interpretation of Injunctions and Injunctional Orders.

§ 2381. Injunction Construed with Reference to Its Intent.

The terms of an injunction are to be reasonably construed with reference to manifest intent and purpose, not with too great strictness, since this might operate to defeat its object, nor with too great liberality, since this might operate with hardship on those who are called upon to obey it. A literal construction that would in effect render the injunction valueless for protective purposes will not be adopted.³⁹ What the courts strive for, in construing an injunction, is to put such an interpretation upon it as will secure obedience to the spirit of the order and obtain the desired protection without at the same time unduly harassing or annoying the party whose obedience is required.

Rodgers v. Pitt (1898) 89 Fed. 425, 429: In regard to construction and effect of injunctive orders, the court said: "Courts are always disposed to allow a fair latitude of construction as to the terms of the injunction, and in many cases only require that it should be obeyed in its spirit, so that no injury should be occasioned to the complaining party. But they are never inclined to look with any degree of indulgence on schemes which are devised to thwart their orders. Any person who has been enjoined, who undertakes to see how far he can go or what he may do without crossing the prohibited line, places himself in a dangerous condition, and is always liable to be deemed guilty of contempt; for his own judgment may be so warped by his feelings or necessities that he is liable, even unintentionally, to overstep the legal bounds."

³⁶ *Dunks v. Grey* (1880) 3 Fed. 862.

³⁹ *Ex parte Richards* (1902) 117 Fed.

³⁷ *Cole v. Cunningham* (1890) 133 U. 658, 666.
S. 116, 33 L. ed. 543.

³⁸ *Cherokee Nation v. Georgia* (1831)

5 Pet. 79, 8 L. ed. 53.

§ 2382. Construction of General Words.

An injunction must be construed with reference to the case made in the bill, and more particularly with reference to its prayer,⁴⁰ and with reference to the particular wrong it was intended to prevent. An injunction must not be given an unnatural construction either for purposes of enlargement or restriction. General words of injunction are therefore not to be given effect in their entire latitude where the bill contemplates particular relief and the prayer seeks an injunction against the particular type of injury; especially where to give effect to the broad and general terms contained in the writ would clearly transcend the particular purpose of the injunction and constitute an unreasonable restriction of the rights of the person enjoined.

1. *Conway v. Taylor* (1861) 1 Black 603, 632, 17 L. ed. 191, 202: In a suit to restrain interference with a ferry franchise, the proprietors of a particular boat were enjoined under "all or any circumstances, from transporting persons or property" between the places designated. The supreme court construed this language as enjoining the defendants from transporting persons or property between those points "in violation of the ferry rights of the plaintiff," it being the manifest purpose of the decree to protect this right. Accordingly, it was held that while this injunction prevented the defendants from running their boat as a ferry boat, it did not prevent them from otherwise transporting persons or property in the ordinary course of commercial navigation.

2. *Enoch Morgan's Sons Co. v. Gibson* (C. C. A.; 1903) 122 Fed. 420: The plaintiff obtained a decree to the effect that it was entitled to the exclusive use of the word "Sapolio" as a trade-mark in connection with a certain cleansing material; and the defendant was enjoined from using that word and the word "Sapolish" in connection with the sale of his similar goods. It was held that the injunction was not to be so construed as to prevent the defendant from using the word on his packages in order to discriminate his article from the plaintiff's and to show that the substance sold by him was not Sapolio but, as he claimed, something better.

By a parity of reasoning, if it appears that the purpose of the suit and the object of the injunction cannot be attained without construing the injunction in the full and broad sense of the terms used, it will be given this construction.

In re Chiles (1874) 22 Wall. 157, 166, 22 L. ed. 819, 822: The ownership of certain bonds and coupons had been in controversy in a suit brought to recover the possession and control of them and to quiet the title thereto. The defendant relied on a title acquired by virtue of a certain contract; but a decree was entered

⁴⁰ *City of Duluth v. Abbott* (C. C. A.; 1902) 117 Fed. 137, 55 C. C. A. 153.
Eq. Prac. Vol. II.—88.

against him, and he was enjoined from setting up any claim or title to any of the bonds and coupons. The injunction was general in terms and was not limited to a prohibition against the assertion of title obtained under the particular contract. The injunction was given effect to the full extent of its terms; and accordingly it was held that the defendant violated the injunction by afterwards asserting title derived from some other source than the contract that he had set up. The bill being one to quiet title, the defendant was bound to set up in that suit any sort of interest that he might have, and the decree was therefore conclusive of the title in every aspect.

Appeal from Order Granting Injunction.

§ 2383. Statutory Right of Appeal.

An order granting a preliminary injunction is an interlocutory order, and therefore upon general principle no appeal can be taken to reverse the action of the court of first instance in granting such an order. It is, however, provided by statute that an appeal may be taken to the circuit court of appeals from any order or decree of a circuit or district court granting an injunction. Such an appeal must be taken within thirty days from the entry of the order or decree, and it is entitled to precedence in the appellate court.⁴¹

§ 2384. Suspending Injunction Pending Appeal.

Injunctions are not vacated or superseded by the mere granting or perfecting of an appeal. This applies to all injunctive orders, whether final or preliminary, and without regard to the question whether the injunction is merely in perpetuation of a former decree or is granted for the first time. It also applies to writs of error sued out upon decrees of the state court. It is true that, by equity rule 93, the judges of the equity courts are given authority, upon allowing an appeal from a final decree, to specify in the order whether the injunction shall be suspended during the appeal. If not so suspended, the injunction continues to operate with full effect until the supreme court disposes of the case.⁴² The right of suspending an injunction

⁴¹ This statute first appeared in the Douglas Park Jockey Club (1906) 78 Act of March 3, 1891, establishing the C. C. A. 199, 148 Fed. 513. During the period between Act of Feb. 18, 1895, ch. 96 (28 Stat. L. 666) and the act of June 6, 1900, ch. 803 (Stat. L. 660) the appeal lay from an order or decree refusing to grant the interlocutory injunction; but by the later act April 14, 1906, ch. 1827, 34 Stat. L. 116, this privilege was taken away. ⁴² Leonard v. Ozark Land Co. (1885) 115 U. S. 465, 29 L. ed. 445; Hovey v. Grainger v.

during the pendency of an appeal from an interlocutory order granting the same is derived from the statute conferring the right of appeal. This power of control can now be exercised either by the court from which the appeal is taken or by the appellate court, or a judge thereof, during the pendency of the appeal; and the court below is allowed in its discretion to require an additional bond as a condition of the appeal.⁴³ Though the court of first instance should decide to dismiss the bill, it will yet continue the preliminary injunction pending the appeal if such course appears to be necessary to prevent irreparable injury and preserve the *status quo*.⁴⁴

As the operation of an injunction is not interfered with by the taking of an appeal, so the mere prosecution of an appeal cannot operate as an injunction when none has been granted, or where the injunction actually granted has been dissolved.⁴⁵

§ 2385. Case Presented on Appeal.

The case presented upon an appeal from an order granting a preliminary injunction is quite different from that which arises upon an appeal from a final decree granting a permanent injunction. In the former case the court is not at all concerned with the ultimate merits of the controversy; in the latter, ultimate merit is the sole question for decision.⁴⁶

§ 2386. Reviewing Discretion of Lower Court.

Upon appeal from an order granting a preliminary injunction the higher court will review the case and determine what should have been the proper course for the lower court to pursue in the premises and on the case as presented to it. The matter is to be judged from

McDonald (1883) 109 U. S. 150, 161, ity, or otherwise, as he or it may from time to time consider proper for pre-
27 L. ed. 888, 891; Slaughter-House Cases (1869) 10 Wall. 273, 297, 19 L. serving the rights of the parties. No. 22 of Rules of Circuit Court of First
ed. 915, 922.

⁴³ See Act of April 14, 1906, ch. 1827, Circuit.

34 Stat. L. 116. ⁴⁴ Cotting v. Kansas City etc. Co. (1897) 82 Fed. 850.

The following rule is in force in the First Circuit: When an appeal from a final or an interlocutory decree in an equity suit granting or dissolving an injunction is allowed, the judge from

whose decision the appeal is taken, or this court, may, in his or its discretion at the time of such allowance or afterwards, and from time to time, make an order or orders suspending or modifying the injunction during the pendency of the appeal, upon such terms as to secur-

⁴⁵ Leonard v. Ozark Land Co. (1885) 115 U. S. 465, 29 L. ed. 445; Knox County v. Harshman (1889) 132 U. S. 14, 16, 33 L. ed. 249, 250.

⁴⁶ Adam v. Folger (C. C. A.; 1903) 56 C. C. A. 540, 120 Fed. 260; Colorado Eastern R. Co. v. Chicago etc. R. Co. (C. C. A.; 1905) 73 C. C. A. 132, 141 Fed. 898; Hammond Elevator Co. v. Board of Trade (C. C. A.; 1905) 74 C. C. A. 430, 143 Fed. 292.

the standpoint of the lower court.⁴⁷ But it is to be remembered that the act of the court of first instance in granting or refusing a preliminary injunction is a matter of discretion. Hence, this act, like all other discretionary acts, is subject to reversal only in a case where discretion has been improvidently exercised or abused. Presumptively the action of the lower court was right.⁴⁸

Vogel v. Warsing (C. C. A.; 1906) 77 C. C. A. 199, 146 Fed. 949, 953: The principle governing the appellate court in passing on appeals from interlocutory orders granting an injunction, was stated thus: "The granting or withholding of an injunction *pendente lite* ordinarily rests in the sound discretion of the court to which the application is made. It is not for this court to say whether it would have granted or withheld an injunction upon the showing which was made in the court below. We must recognize that upon that court was imposed the responsibility of the exercise of sound discretion upon the case as it was presented. Unless there has been a plain disregard of the facts or of the settled principles of equity applicable thereto, the exercise of the discretion of that court is not subject to reversal in this."

The presumption in favor of the correctness of the order of the court of first instance is, of course, only a presumption of logic and good sense. It arises from a consideration of the fact that the judiciary is composed of men of sense and legal training, and their course in passing on an application for a preliminary injunction is presum-

⁴⁷ *Kansas etc. R. Co. v. Payne* (C. C. Columbia Phonograph Co. (C. C. A.; 1892) 1 C. C. A. 183, 49 Fed. 114; 1903) 58 C. C. A. 639, 122 Fed. 623; *Massie v. Buck* (C. C. A.; 1904) 82 C. Hammond Elevator Co. v. Board of C. A. 535, 128 Fed. 27; *City of Newton Trade* (C. C. A.; 1905) 74 C. C. A. 430, v. *Levis* (C. C. A. 1897) 25 C. C. A. 161, 143 Fed. 292; *Denver etc. R. Co. v. U. S.* (C. C. A.; 1903) 59 C. C. A. 578, 124 Fed. 715.

⁴⁸ *Duplex Printing Press Co. v. Campbell etc. Co.* (C. C. A.; 1895) 16 C. C. A. 220, 69 Fed. 253; *Thompson v. Nelson* (C. C. A.; 1895) 18 C. C. A. 137, 71 Fed. 339; *Bissell Carpet-Sweeper Co. v. Goshen etc. Co.* (C. C. A.; 1896) 19 C. C. A. 25, 72 Fed. 550; *Mayor etc. v. Africa* (C. C. A.; 1896) 23 C. C. A. 252, 77 Fed. 500, 511; *Garrett v. Garrett* (C. C. A.; 1896) 24 C. C. A. 173, 78 Fed. 472; *Southern Pac. Co. v. Earl* (C. C. A.; 1897) 27 C. A. 185, 82 Fed. 690, 692; *Carson v. Combe* (C. C. A. 1898) 29 C. C. A. 680, 86 Fed. 202; *Proctor & Gamble Co. v. Globe etc. Co.* (C. C. A.; 1899) 34 C. C. A. 405, 92 Fed. 357; *Lake Shore etc. R. Co. v. Felton* (C. C. A.; 1900) 43 C. C. A. 189, 103 Fed. 227; *Thomas G. Plant Co. v. May Co.* (1900) 44 C. C. A. 534, 105 Fed. 375; *Louisville Home Tel. Co. v. Cumberland etc. Co.* (C. C. A.; 1901) 42 C. C. A. 254, 102 Fed. 197, 49 C. C. A. 524, 111 Fed. 667; *Rahley v. 199.* During the period when an appeal lay from an order denying a preliminary injunction, the appellate court, in re-viewing the action of the court of first instance in refusing to grant such relief, applied the same principles as maintain where the relief has been granted and an appeal taken from such affirmative order. *Allison v. Corson* (C. C. A.; 1898) 88 Fed. 581, 32 C. C. A. 12; *Higginson v. Chicago etc. Co.* (C. C. A.; 1900) 42 C. C. A. 254, 102 Fed. 197,

ably more likely to be right than wrong. The ~~e~~ is no legal presumption in favor of the propriety of the order such as in any sense precludes the appellate court from doing exactly what it thinks should be done.

§ 2387. Review of Injunction Granted by Court of Ancillary Jurisdiction.

An appellate court will not readily reverse an order granting or continuing an injunction made by a court exercising ancillary jurisdiction where such court in granting the injunction has merely followed the course of the court of primary jurisdiction.⁴⁹

§ 2388. Modification of Injunction by Appellate Court.

If an injunction is adapted to the state of affairs existing at the time it is granted, the order granting the same will not be reversed or modified merely because the injunction is so broad as possibly to interfere with legitimate business under different conditions in the future. If such a future contingency arises, the party has his remedy by means of an application to modify the injunction.⁵⁰ An injunction, however, that goes farther than the actual existing situation justifies, will be modified to that extent on appeal.⁵¹

§ 2389. Making of Terms by Appellate Court.

On appeal from an order granting an injunction, the appellate court may remand and declare terms upon complying with which the injunction may be allowed to stand.⁵²

⁴⁹ *United States Gramophone Co. v. Seaman* (C. C. A.; 1902) 113 Fed. 745, etc. *R. Co. v. Colorado Eastern R. Co.* (C. C. A.; 1905) 73 C. C. A. 419. ⁵¹ *Chicago* ⁵⁰ *W. G. Rogers Co. v. International Silver Co.* (C. C. A.; 1902) 55 C. C. A. 83, 118 Fed. 133; *Sperry & Hutchinson Co. v. Mechanics' etc. Co.* (1904) 128 Fed. 1,015. *v. King* (C. C. A.; 1898) 90 Fed. 136, 32 C. C. A. 536.

CHAPTER LIX.

INJUNCTIONS (*continued*).

Dissolution and Modification.

a. In General:

- § 2300. Power of Court to Dissolve or Modify.
- 2391. Control of Injunction in Removal Cause.
- 2302. Dissolution of Injunction as Incident of Final Decree.
- 2393. Injunction Waived by Supplemental Bill.

b. Motion to Dissolve or Modify:

- 2394. Grounds of Motion.
- 2395. Time for Making Motion.
- 2396. To What Judge Application Made.
- 2397. Notice of Motion.
- 2398. Discretion of Court in Discharging Injunction.
- 2399. Burden on Moving Party.
- 2400. Case Made in Bill Must Be Met.
- 2401. Scope of Inquiry on Motion to Modify.
- 2402. Proofs Available on Motion to Dissolve.
- 2403. Considerations Justifying Dissolution of Injunction.
- 2404. Want of Equity—Want of Jurisdiction.
- 2405. Cause Not of Equitable Cognizance.
- 2406. Laches in Prosecution of Suit—Waiver of Injunctive Relief.
- 2407. Injunction Dissolved Where Answer Meets Case Made in Bill.
- 2408. Limitations of This Rule.
- 2409. Denials on Information—Irrresponsive Averments.
- 2410. When General Rule Applicable in Federal Courts.
- 2411. Admission of Affidavits to Contradict Answer.
- 2412. Introduction of Affidavits Opens Whole Matter.
- 2413. Imposition of Equitable Terms.
- 2414. Effect of Refusal to Dissolve Injunction.
- 2415. Modification of Injunction as Affecting Liability on Bond.
- 2416. Order Maintaining Injunction Cures Prior Irregularity.
- 2417. Reinstatement of Injunction.
- 2418. Dismissal Where Injunctive Relief Impossible.

Proceedings on Injunction Bond.

- 2419. Bond as Prerequisite to Recovery of Damages.
- 2420. Proceedings on Bond.
- 2421. Present Practice in Federal Courts.
- 2422. By What Law Liability Determined.
- 2423. Federal Question.

- § 2424. Retrospective and Prospective Obligation of Bond.
- 2425. Elements of Recoverable Damage.
- 2426. Damage Incident to Delay of Suit.
- 2427. No Recovery for Damages Not Specified in Declaration.
- 2428. Power of Court to Remit Liability on Bond.
- 2429. Remission of Liability Discretionary.
- 2430. Surety Must Have Day in Court.
- 2431. Estoppel of Surety.
- 2432. Surety's Right to Indemnity.

Final Injunction.

- 2433. Incident of Final Decree.
- 2434. Defense after *Pro Confesso*.
- 2435. Final Decree Not Concluded by Preliminary Decree.
- 2436. Considerations Affecting Right to Final Injunction.
- 2437. Balance of Convenience Not Determinative.
- 2438. When Granting of Permanent Injunction Discretionary.
- 2439. Form of Decree—Retention of Jurisdiction over Injunction.
- 2440. Modification of Injunction upon Change of Conditions.
- 2441. Supplemental Bill by Person Deriving Title from Plaintiff.
- 2442. Supplemental Bill against Person Deriving from Defendant.
- 2443. Second Suit for Injunction.

Dissolution and Modification.

a. In General.

§ 2390. Power of Court to Dissolve or Modify.

The authority to grant an injunction necessarily implies an authority to dissolve; and a court that has issued a preliminary injunction has inherent power to suspend, dissolve, discharge, or modify it.¹ This power extends to the dissolution or modification of injunctions resulting from orders granted in vacation as well as to those resulting from orders granted in term time.²

§ 2391. Control of Injunction in Removal Cause.

In injunction causes removed from state courts, the federal court has the same control over the injunctive process as if the suit had originated in the federal court; and the injunction will be dissolved or continued in force, as the exigency of the situation may require.³

¹ *Barnard v. Gibson* (1849) 7 How. (1846) 1 Woodb. & M. 248; *Tucker v. 650, 658, 12 L. ed. 857, 860; Muller v. Carpenter* (1841) Hempst. 440. Henry

² *Sawy. 464; Western Adams v. Douglas County* (1868)

³ *North Carolina R. Co. v. Drew* (1877) McCahon 235, Fed. Cas. No. 52.

³ *Woods* 674; *Goldmark v. Kreling* State of Arkansas v. Kansas etc. Co.

(1885) 25 Fed. 349; *Woodworth v. Hall* (1899) 96 Fed. 353; Texas etc. R. Co.

The mode of proceeding in such cases is the same as in cases where the injunction is granted by the federal court itself.⁴

§ 2392. Dissolution of Injunction as Incident of Final Decree.

An injunction may be modified or discharged by any decree inconsistent with the injunction; and it is not necessary that the decree by which the injunction is modified or discharged should expressly purport to modify or dissolve the injunction. A final decree terminates the preliminary injunction by implication, even though no mention be made of it;⁵ and of course dismissing a bill operates to dissolve the injunction granted upon the filing of the bill.⁶ After a final decree has been entered a motion to dissolve the preliminary injunction will not be entertained, as there is then nothing to dissolve.⁷

§ 2393. Injunction Waived by Supplemental Bill.

The filing of an amended or supplemental bill may operate to waive the benefit of the preliminary injunction granted under the original bill; but in order that it may have this effect, there must be something incongruous or incompatible between the matter of the amended or supplemental bill and the right to injunctive relief. A supplemental bill that aims at the more effectual enforcement of the injunction does not waive it.⁸

b. Motion to Dissolve or Modify.

§ 2394. Grounds of Motion.

Injunctions are most frequently qualified, altered, or discharged upon motion or application to that effect preferred by the party injuriously affected by the injunction. The four principal grounds of motions to dissolve are: (1) Want of jurisdiction in the court; (2) want of equity on the face of the bill; (3) that the statements in the bill on which its equity rests are fully met and overcome by the answer or by affidavits filed by the defendant; (4) that there has been a want of diligence on the part of the plaintiff in the prosecution of his suit.

⁴ Rust (1883) 5 McCrary 348; Carrington v. Florida R. Co. (1872) 9 Blatchf. Cas. No. 4,549.

⁵ Mahoney Min. Co. v. Bennett (1877) 4 Sawy. 289.

⁶ Coburn v. Cedar Valley etc. Co. (1885) 25 Fed. 791.

⁷ Sweeney v. Hanley (C. C. A.; 1903) 126 Fed. 97, 99.

⁸ Buffington v. Harvey (1877) 95 U. S. 99, 24 L. ed. 381; Eureka etc. Co. v. 490, Fed. Cas. No. 4,643.

An injunction may be dissolved upon a showing of irregularity in the order granting the writ, or upon a showing that the writ was improvidently granted through mistake or misapprehension on the part of the court, or when some new fact arises, or is made to appear, that makes it inequitable for the injunction to be continued in force. A motion for the modification or discharge of an injunction may be maintained either upon a sufficient showing affecting the ground upon which the injunction was originally granted or upon a showing of new matter arising subsequent to the order granting the injunction.⁹

§ 2395. Time for Making Motion.

An injunction may be dissolved or modified on motion made at any time after the granting of the fiat. As soon as the defendant has knowledge that an injunction has been issued against him, he may apply at once, without waiting until he has been served with the injunction or the subpoena.¹⁰ The defendant may move to dissolve the injunction before he has filed his answer.¹¹ Where a restraining order has been issued, the cause may be brought before the court on a motion to dissolve at the same time that it is heard on the motion for the preliminary injunction.¹²

The defendant should move to dissolve the injunction, if he thinks it irregular or oppressive, as soon as practicable, since the right to insist on the unconditional dissolution of an injunction may be lost by delay in making the motion.¹³

§ 2396. To What Judge Application Made.

A motion to discharge a restraining order or to dissolve an injunction should be made before the same judge who granted it. Another judge will not entertain a motion to dissolve an injunction based on the same facts as were shown when the injunction was granted; and even in a case where the dissolution is asked on a new showing, the

⁹ Wm. G. Rogers Co. v. International Court may be made as soon as the record etc. Co. (C. C. A.; 1902) 118 Fed. 133, has been filed in the federal court. 55 C. C. A. 83; Sperry & Hutchinson Co. Texas etc. R. Co. v. Rust (1883) 5 Mcr. Mechanics' etc. Co. (1904) 128 Fed. Cray 348.

10 15; Hammond Elevator Co. v. Board of Trade (C. C. A.; 1908) 143 Fed. 292, Fed. Cas. No. 52.

74 C. C. A. 430. ¹¹ Adams v. Douglas County (1868) 1 St. Louis Type Foundry v. Carter ¹² St. Louis Type Foundry v. Carter

¹⁰ Waffle v. Vanderheyden (1839) 8 etc. Co. (1887) 31 Fed. 524.

Paige 45. ¹³ Read v. Consequa (1821) Fed. Cas.

In a removal case the motion to dissolve an injunction granted in a state No. 11,806,

judges are loath to meddle with one another's orders, unless the necessity for immediate action is great. The same consideration is shown by the circuit judges in regard to the orders of a district judge made in the capacity of judge of the circuit court as is shown in regard to the orders of a circuit judge acting in the same capacity.¹⁴

Where the judge who granted the original injunction is dead, or where for any other reason it is impossible or impracticable to bring up the application for the dissolution of the injunction before him, the matter may, of course, be brought before another judge. But in this case it has been suggested that, when practicable, two judges should hear the motion.¹⁵

§ 2397. Notice of Motion.

Reasonable notice of a motion to dissolve, discharge, or modify an injunction must always be given to the party adversely interested or his solicitor.¹⁶ The period of three days has been considered sufficient for notice of such a motion.¹⁷

If a party who has had reasonable notice of a motion to dissolve an injunction fails to prepare himself to meet the motion, the court will not continue the hearing of the motion in order to enable him to meet it.¹⁸

§ 2398. Discretion of Court in Discharging Injunction.

On consideration of a motion to modify or dissolve a preliminary injunction, the court is governed by the same principle of discretion that is operative upon the hearing of the original application for the injunction. No inflexible rule can be laid down. Each case is to be determined on its own facts; and the matter of the continuance or dissolution of the injunction is in every case in the sound discretion of the court.¹⁹ The circumstance, that on hearing a motion for a

¹⁴ *Reynolds v. Mining Co.* (1888) 33 Fed. 354; *Klein v. Fleetford* (1888) 35 Fed. 98; *Ide v. Crosby* (1900) 104 Fed. 582.

¹⁵ *Westerly Waterworks v. Westerly* (1896) 77 Fed. 783.

¹⁶ *New York v. Connecticut* (1799) 4 Dall. 1, 1 L. ed. 715; *Wilkins v. Jordan* (1813) Fed. Cas. No. 17,865.

¹⁷ *Caldwell v. Walters* (1835) Fed. Cas. No. 2,305.

As to the practice in some of the earlier cases see *Burford v. Ringgold* (1805) Fed. Cas. No. 2,152; *Stoddert v. Waters* (1808) Fed. Cas. No. 13,472.

¹⁸ *Coburn v. Cedar Valley etc. Co.* (1885) 25 Fed. 791.

¹⁹ *Buffington v. Harvey* (1877) 95 U. S. 100, 24 L. ed. 382; *King v. Williamson* (C. C. A.; 1897) 80 Fed. 170, 25 C. C. A. 355; *Tucker v. Carpenter* (1841) Hempst. 440; *Poor v. Carleton* (1837) 3 Sumn. 70, Fed. Cas. No. 11,272; *Orr v. Littlefield* (1845) 1 Woodb. & M. 13; *Norton v. Hood* (1882) 12 Fed. 764; *Nelson v. Robinson* (1846) Fed. Cas. No. 10,114.

preliminary injunction, the court entered upon a consideration of the merits of the case does not make this proceeding an adjudication on the merits in such sense as to preclude the court from subsequently exercising a discretion to dissolve the same injunction.²⁰

§ 2399. Burden on Moving Party.

Though the granting of an order for the dissolution of an injunction rests entirely in the discretion of the court, the court will not ordinarily grant the motion unless good reason is shown for so doing; and the burden is on the defendant to make it appear that the motion should be granted. The granting of the preliminary injunction itself is a judicial act; and where the writ has been once granted upon a sufficient showing, it will be presumed to be proper until the contrary is made to appear.

Where the preliminary injunction is admitted to have been properly issued in the first place, an order of modification will not be granted for new matter unless the defendant shows clearly that he is entitled to such modification. The burden is decidedly on him:²¹

§ 2400. Case Made in Bill Must Be Met.

Upon a motion to dissolve an injunction the allegations of the sworn bill are to be taken as true in so far as they are not met and denied by the answer²² or in other proofs produced by the defendant. Affidavits that only partially meet the case made in the bill are not sufficient to justify a dissolution of a preliminary injunction.²³ A motion to dissolve will not be allowed where the only pleading or document submitted to the court is the bill itself, which states a good cause of action and shows a *prima facie* ground for the injunction.²⁴

§ 2401. Scope of Inquiry on Motion to Modify.

In passing on a motion to modify an injunction, the court will not go into an examination of a collateral matter not necessary to be decided in connection with the injunction. In a case where a preliminary injunction had been granted to restrain the infringement of a patent, the defendant applied for a modification of the injunction

²⁰ Westerly Waterworks *v.* Town of Westerly (1896) 77 Fed. 783.

²² Gulf Bag Co. *v.* Suttner (1903) 124 Fed. 467.

²¹ Sperry etc. Co. *v.* Mechanics' Clothing Co. (1904) 128 Fed. 1015.

²⁴ Lyster *v.* Stickney (1882) 12 Fed. 609.

²² Young *v.* Grundy (1810) 6 Cranch 51, 3 L. ed. 149.

²³ For illustration of conditions that will not warrant the dissolution of a prelimi-

so as to make it declare in terms that a new article put forth by him was not obnoxious to the injunction; but the court refused to grant the modification, for in order to do so, it would have been necessary to determine whether this new article constituted an infringement. The proper course was for the defendant to sell the article, if he saw fit to do so, and run the risk of being brought up upon contempt proceedings.²⁵

§ 2402. Proofs Available on Motion to Dissolve.

At the hearing of the motion, the defendant may avail himself of his answer and, under the present practice, of any affidavits, depositions, or documents, that he may see fit to file in support of his answer. In order that the answer may serve the purpose of procuring the dissolution of an injunction it should be under oath; and this, even though the oath to the answer is expressly waived in the bill. The plaintiff, on the other hand, in opposing the motion to dissolve, may avail himself of the allegations of his sworn bill and, under the present practice, of such affidavits as he may introduce in support of his bill and in opposition to the proofs of the defendant.

§ 2403. Considerations Justifying Dissolution of Injunction.

An injunction will usually be dissolved on such a showing of facts as would have prevented the issuance of the injunction in the first instance, if those facts had then been presented.²⁶ For instance, an injunction will be dissolved when the court can perceive that nothing beneficial to the plaintiff can result from its continuance;²⁷ or where, for any reason, it is manifest that the bill must in the end be dismissed, as for the absence of a necessary party.²⁸ An injunction will be modified or dissolved where the party against whom it operates will thereby be relieved from inconvenience and loss, without jeopardizing the just rights of the plaintiff.²⁹

A preliminary injunction granted on a bill filed to preserve the *status quo*, pending an action at law should be dissolved whenever

nary injunction in a labor dispute case, ²⁶ Cary v. Domestic Spring-Bed Co. ²⁷ see Gulf Bag Co. v. Suttner (1903) 124 Fed. 26 Fed. 38. Fed. 467; Coeur d'Alene etc. Co. v. Min- ²⁸ In re Jackson (1881) 9 Fed. 493. ers' Union (1892) 51 Fed. 260, 19 L. ²⁹ Eldred v. American Palace-Car Co. R.A. 382; Edison Electric Light Co. (C. C. A.; 1900) 105 Fed. 457, 44 C. C. v. Universal Light Co. (1894) 64 Fed. A. 564.
229. ²⁹ Denver etc. R. Co. v. U. S. (C. C. 25 Texas etc. Co. v. Kuteman (C. C. A.; 1903) 124 Fed. 156, 161, 59 C. C. A.; 1892) 54 Fed. 547, 4 C. C. A. 503. 579.

it is made to appear that the defendant in the injunction has been successful in the action at law.³⁰

§ 2404. Want of Equity—Want of Jurisdiction.

Want of equity and, *a fortiori*, want of essential jurisdiction are always good grounds for dissolving an injunction;³¹ and an injunction should always be dissolved at once when the court is brought to see that its jurisdiction has been improperly and collusively invoked. Even though the cause be not actually dismissed, but is retained so that the question of jurisdiction may be formally and more fully tested, the preliminary injunction should be dissolved.³²

§ 2405. Cause Not of Equitable Cognizance.

If a court of equity, having granted a preliminary injunction, finds that the suit is not of equitable cognizance it should dismiss the suit in so far as it seeks substantive relief; but, if desirable, the injunction may be continued until the plaintiff can institute his suit at law. In other words, a bill for injunction and relief may be retained for the purposes of injunction so far as this is necessary as an auxiliary to the suit at law, though equity has not jurisdiction as to the relief.³³

§ 2406. Laches in Prosecution of Suit—Waiver of Injunctive Relief.

Culpable and unjustifiable delay in the prosecution of a suit is sufficient ground for dissolving an injunction. But if the delay results from necessity or is not chargeable to the fault of the plaintiff, it is otherwise.³⁴ While a preliminary injunction might be dissolved on a showing that the plaintiff has waived the delinquency on which the claim to injunctive relief was based, the waiver must be unambiguous and must go to the whole extent of the matters complained of as wrongful.³⁵

³⁰ King *v.* Williamson (C. C. A.; 1897) 80 Fed. 170, 25 C. C. A. 365. Compare Fletcher *v.* New Orleans etc. Co. (1884) 20 Fed. 345.

³¹ Adams *v.* Douglas County (1868) (1827) Fed. Cas. No. 7,758; McLean Fed. Cas. No. 52; Kidwell *v.* Masterson v. Mayo (1901) 113 Fed. 106. See Hagan v. Blindell (C. C. A.; 1893) 58 Fed. 696, 6 C. C. A. 86.

³² Industrial etc. Co. *v.* Electrical Supply Co. (C. C. A.; 1893) 58 Fed. 732, 7 C. C. A. 471.

³³ Horsburg *v.* Baker (1828) 1 Pet. 232, 7 L. ed. 125.

³⁴ Parker *v.* Winnipiseogee Lake Cotton etc. Co. (1862) 2 Black 552, 17 L. ed. 337; Schermehorn *v.* L'Espenasse (1796) 2 Dall. 360, 1 L. ed. 415, Fed. Cas. No. 12,454; Bradley *v.* Reed (1864) Fed. Cas. No. 1,785; Read *v.* Consequa (1821) Fed. Cas. No. 11,606.

³⁵ Lowenfeld *v.* Curtis (1896) 72 Fed. 105.

§ 2407. Injunction Dissolved Where Answer Meets Case Made in Bill.

Where an application for the dissolution of an injunction comes on for hearing after the defendant has filed his answer, it becomes a question of importance to determine the weight that should be attributed to the answer. Upon this point it has long been an established rule that a preliminary injunction will be dissolved, the application being heard upon bill and answer alone, where the answer denies and fully meets all the equities of the bill.³⁶ This rule has resulted from the fact that the responsive answer could, under the practice of the English chancery, be met and overcome at the final hearing only by the testimony of two witnesses or of one witness and corroborating circumstances. The same principle was applied upon the hearing of motions for the granting or dissolution of an injunction; and inasmuch as the plaintiff was not allowed, under the English practice, to file affidavits to contradict the answer, it necessarily followed that if the answer fully met the case made in the bill, the injunction had to be dissolved, the oath of the plaintiff to the bill not being sufficient of itself to overcome the oath of the defendant to the answer.

§ 2408. Limitations of This Rule.

But in order that this rule may apply, it is necessary that the answer should be in every respect sufficient both in law and fact. For instance, to justify a dissolution on the coming in of an answer, the denials of the answer must be specific and must be directed to the material facts on which the injunction is based.³⁷ If the answer fails fully to meet the allegations and the equity of the bill, the preliminary injunction will not be dissolved.³⁸ An answer is ineffectual to obtain the dissolution of a preliminary injunction where it formally denies the equities of the bill but fails to deny the facts on which those equities rest.³⁹

³⁶ Coburn v. Cedar Valley Land etc. answer when it meets and denies the Co. (1885) 25 Fed. 791; Sioux City etc. equities of the bill is sufficient to prevent R. Co. v. Chicago etc. R. Co. (1886) 27 the granting of an injunction or even to Fed. 770; Brammer v. Jones (1867) 2 justify an order dissolving it. Haight Bond 100; U. S. v. Parrott (1858) 1 v. Morris Aqueduct (1828) 4 Wash. C. McAll. 271; Northern Pac. R. Co. v. C. 601, Fed. Cas. No. 5,902. Burlington etc. R. Co. (1880) 2 McCrary ³⁷ Carter v. Carlisle (1846) Fed. Cas. 203; Nelson v. Robinson (1853) Hempst. No. 2,474; Nelson v. Robinson (1846) 464. Fed. Cas. No. 10,114.

Although an answer of a corporation ³⁸ Northern Pac. R. Co. v. Barnesville under a corporate seal is not entitled etc. Co. (1880) 4 Fed. 298. to the weight as evidence which attaches ³⁹ Ford v. Taylor (1905) 140 Fed. to a sworn answer, nevertheless such an 356,

§ 2409. Denials on Information—Irresponsive Averments.

Denials based merely on information and belief are insufficient to obtain a dissolution as against the direct charges of a bill based upon personal knowledge.⁴⁰ A denial of a mere conclusion is not enough;⁴¹ and the same is true of irresponsive averments.⁴² A temporary injunction will not be dissolved upon an answer admitting the material equities of the bill and setting up new matter in avoidance. Thus, in a suit to cancel trust bonds as having been issued by fraud, if the defendant sets up in his answer that he is an innocent purchaser, the preliminary injunction will not be disturbed prior to the final hearing.⁴³

§ 2410. When General Rule Applicable in Federal Courts.

The rule requiring the dissolution of an injunction upon the filing of an answer that fully meets the equities of the bill is applicable in the present practice of the federal courts in all cases where the motion is heard on bill and answer alone; and it is immaterial whether the bill waives the answer under oath or not. In the case where the oath is not waived in the bill, the rule is clearly applicable, because it has never been abolished; and in the case where the oath is waived in the bill, the answer is entitled, upon such motion, to the same weight as if the oath had not been waived.⁴⁴

§ 2411. Admission of Affidavits to Contradict Answer.

Under the present practice of the federal court, the rule we have just been considering does not have as frequent application as formerly, for it applies only where the motion is heard on bill and answer, and under the present practice affidavits are generally admissible to contradict the answer. As a consequence applications for the granting or dissolution of an injunction are seldom heard on bill and answer alone. The discussion contained in the following case is

⁴⁰ Cole Silver Min. Co. v. Virginia etc. Co. (1871) Fed. Cas. No. 2,990; Poor v. Carleton (1837) Fed. Cas. No. 11,272; Mittleburger v. Stanton (1860) Fed. Cas. No. 9,676.

⁴¹ United States v. Carlisle (1871) Fed. Cas. No. 14,724.

⁴² Robinson v. Cathcart (1825) Fed. Cas. No. 11,946.

⁴³ Pere Marquette R. Co. v. Bradford (1906) 149 Fed. 492, 497.

But unresponsive averments setting up "with the same effect as heretofore,"

⁴⁴ The amendment to equity rule 41, by which the plaintiff is permitted to waive the defendant's oath, contains an express reservation to the effect that

when the answer is used on a motion to grant or dissolve an injunction, it may be verified and used as an affidavit,

of value, because it indicates the breaking away of our practice from the strict rule of the English chancery which prohibited the use of affidavits to contradict the answer.

Poor v. Carleton (1837) 3 Sumn. 70, Fed. Cas. No. 11,272: The conclusions reached by Judge Story in regard to the state of the practice at the time this opinion was written may be stated in the following propositions:

(1) There is the general rule to the effect that if the answer denies all the allegations of the bill and fully meets the equities of the bill the injunction will usually be dissolved.

(2) But before the answer will be allowed thus to operate, it must be responsive and must be based on personal knowledge. Mere general denials based on ignorance or hearsay and made merely to settle the issues are not enough. The basis of this proposition was expressed by Judge Story thus: "The ground of the practice of dissolving an injunction upon a full denial, by the answer, of the material facts is, that in such a case the court gives entire credit to the answer, upon the common rule in equity, that it is to prevail, if responsive to the charges of the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances. But it would certainly be an evasion of the principle of the rule, if we were to say that a mere naked denial by a party who had no personal knowledge of any of the material facts were to receive the same credit as if the denial were by a party having an actual knowledge of them."

(3) Furthermore, as regards the application of the general rule, a distinction is to be observed between applications for the dissolution of common injunctions and special injunctions. In cases of common injunctions (incident to suits to stay proceedings at law), the general rule may be safely applied with rigor. Hence in this class of cases it is said to be of course to dissolve the injunction upon an answer denying the whole merits of the bill.

(4) But with regard to special injunctions—and practically all injunctions are now special—a less arbitrary rule is applied, and the dissolution of the injunction is not a matter of course upon the coming in of the answer even though the denials be full and explicit. Said Story, J.: "In cases of special injunctions, if the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But there are exceptions to the doctrine, and these, for the most part, are fairly resolvable into the principle of irreparable mischief; such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violations of copyrights, or of patent rights. In cases of this sort, the court will look to the whole circumstances, and will continue or dissolve the injunction in the exercise of a sound discretion."

(5) Inasmuch as the court is free to use a sound judicial discretion in regard to the dissolution of the special injunction after answer, it follows that the plaintiff may introduce affidavits to contradict the answer, "not indeed to all points, but to many points." And wherever the plaintiff is allowed to introduce affidavits, the defendants may introduce counter-affidavits to the same points, "for otherwise they might be compromised by statements which they would have no opportunity to answer."

§ 2412. Introduction of Affidavits Opens Whole Matter.

The result of this more liberal practice is that, in every case where affidavits are used against the answer, the question of dissolving the injunction is remitted entirely to the sound discretion of the court; and the mere fact that the answer denies all the equities of the bill is not of itself enough to entitle the defendant to a dissolution of the injunction.⁴⁵ For instance, if the case be one turning upon a question of fraud, and this is put in issue by the answer, the court will be slow to dissolve an injunction upon the denials of the answer, even when supported by affidavits, especially where the fraud depends upon inferences to be drawn either from established facts or from facts about which there is conflict upon all the proof before the court.⁴⁶ But if, in ordinary cases, the answer fully meets the allegations of the bill, the preliminary injunction will be dissolved, unless the plaintiff's affidavits are sufficient to overturn the answer.⁴⁷

§ 2413. Imposition of Equitable Terms.

Upon disposing of a motion for the dissolution or modification of a preliminary injunction, the court may impose terms on the defendant as a condition of granting the order for the dissolution or modification of the injunction; as for instance by requiring him to give bond⁴⁸ or to comply with some other equitable condition. On dissolving an injunction against the cutting and removal of timber pending the appeal in a cause where the title to land was in dispute, the court required the defendant to give bond to cover such damages as might be recovered against him and also required him to account to the court from time to time as to the amount of timber taken.⁴⁹

Upon refusing to dissolve a temporary injunction, the court will make orders for the plaintiff to speed the cause, if it appears that the defendant may be unduly prejudiced by delay.⁵⁰

⁴⁵ Blount *v.* Société Anonyme etc. in the bill, but the result would be the same if it had been waived.
 Pasteur (1892) 53 Fed. 98, 3 C. C. A. 455, 457; Duplex Printing Co. *v.* Campbell Printing Press Co. (1895) 69 Fed. 250, 16 C. C. A. 220.

⁴⁶ Pere Marquette R. Co. *v.* Bradford (1906) 149 Fed. 492, 498.

⁴⁷ See Ford *v.* Taylor (1905) 140 Fed. 356 (1905) 137 Fed. 149. In this case the answer under oath was not waived.

Eq. Prac. Vol. II.—89,

⁴⁸ Norton *v.* Eagle Automatic Can Co. (1894) 61 Fed. 293, 294; Comly *v.* Buchanan (1897) 81 Fed. 58; Kilgore *v.* Norman (1902) 119 Fed. 1006.

⁴⁹ Wood *v.* Braxton (1892) 54 Fed. 1005.

⁵⁰ Pere Marquette R. Co. *v.* Bradford (1906) 149 Fed. 492, 499.

§ 2414. Effect of Refusal to Dissolve Injunction.

If a district judge sitting as a court of equity grants a preliminary injunction at one term and at the next term the same judge again sitting in the same capacity refuses to dissolve the preliminary injunction, this operates by implication to continue the injunction in force.⁵¹

§ 2415. Modification of Injunction as Affecting Liability on Bond.

When an injunction is modified the defendant should always insist that the proceedings be so managed that he may not be wholly deprived of the protection of a bond, supposing one to have been originally given. The difficulty here arises from the fact that a modification of the injunction changes the extent of the liability of the sureties and hence may release them. A safe way to proceed would be this: Let us suppose A to have obtained an injunction against B and to have given a bond with sureties to answer for any damage that may be done to B in the event the injunction turns out to have been wrongfully obtained. B afterwards applies to the court for a modification of the injunction and the court determines that this application should be granted. Thereupon, in order fully to protect B, the court enters a decree to the effect that the injunction previously granted is abrogated and dissolved, but that the same may be continued in force, as modified, upon condition that the plaintiff give a new or additional bond, the same sureties of course being eligible on this as on the previous bond. Substantially the same object can be accomplished by granting the modification and entering an order *nisi* to the effect that the injunction be vacated and annulled if the plaintiff fails to give a new bond.

Tyler Min. Co. v. Last Chance Min. Co. (C. C. A.; 1898) 90 Fed. 15, 32 C. C. A. 498: Upon the granting of an injunction against the operation of a mine by the defendants and a removal of ore, a bond was given by the direction of the court. Subsequently the injunction order was so modified by the court as to permit the resumption of the work under certain specified conditions. No new or additional bond was required. It was held that the modification of the injunction released the sureties on the bond from all liability for damages thereafter resulting to the defendant from the continuance of the injunction and that the only damages that could be recovered on the bond were such as accrued after the bond was given and prior to the modification of the injunction.

⁵¹ *Industrial & Min. Guaranty Co. v. Judges of Circuit Court (1827)* 12 Electrical Supply Co. (C. C. A.; 1893) Wheat. 561, 6 L. ed. 729. 58 Fed. 732, 7 C. C. A. 471. See Parker

§ 2416. Order Maintaining Injunction Cures Prior Irregularity.

If an injunction is irregular on account of having been prematurely granted, and the defendant then moves to dissolve it but the court refuses to do so, the order refusing a dissolution will operate to cure the irregularity in the original order. Having at all times a discretion in regard to the matter of the maintenance or dissolution of the injunction, a refusal to dissolve is equivalent to the promulgation of a new order.⁵²

§ 2417. Reinstatement of Injunction.

After a preliminary injunction has been dissolved, it may be restored by proper application, but there should, of course, be a showing of manifest mistake on the part of the court or new facts should be shown by affidavits, which make the restoration of the injunction desirable and necessary.⁵³ Where an injunction is dissolved for insufficiency of the sureties on the bond, the court may subsequently reinstate the injunction upon the giving of sufficient security.⁵⁴

§ 2418. Dismissal Where Injunctive Relief Impossible.

When, in a suit for an injunction, the granting of injunctive relief becomes impossible because of some circumstance occurring after the suit is brought, the bill will be dismissed, and it cannot be retained for the granting of other relief under the general prayer when other necessary parties are not before the court.⁵⁵

*Proceedings on Injunction Bond.***§ 2419. Bond as Prerequisite to Recovery of Damages.**

No damages are recoverable for the wrongful suing out of an injunction unless a bond has been exacted by the court granting the injunction;⁵⁶ though if it appears that the injunction was maliciously sued out without any just foundation whatever, damages might be recovered in a proper case.⁵⁷

⁵² Universal etc. Trust Co. v. Stoneburner (C. C. A.; 1902) 113 Fed. 251, 51 C. C. A. 208.

⁵³ Edison Electric Light Co. v. Buckley etc. Co. (1894) 64 Fed. 225.

⁵⁴ Goldmark v. Kreling (1885) 25 Fed. 349.

⁵⁵ Bonner v. Terre Haute etc. R. Co. (C. C. A.; 1907) 151 Fed. 985, 81 C. C. A. 476.

⁵⁶ Scheck v. Kelly (1899) 95 Fed. 941.

⁵⁷ And if a bond is given, damages for the malicious prosecution may be recovered in excess of the penalty of the bond against the principal and such sureties as deliberately participated in the plaintiff's malicious design. Terry v. Robbins (1903) 122 Fed. 725.

§ 2420. Proceedings on Bond.

As to the mode in which the party who is protected by an injunction bond may proceed to recover the damages covered by the bond and incurred by him as a result of the wrongful suing out of the injunction, there has been some diversity of opinion, and the practice has not been uniform. If there be any statute or specific rule of the court, or indeed a provision of the bond itself, providing for a particular method of procedure for the ascertainment of the damages, this would be controlling. But in the common case, where the condition of the bond is simply that the party shall pay such damages as the other shall incur from the wrongful suing out of the writ, and where there is no specific statute or rule pointing out the method to be followed, a question has arisen whether the court of equity itself should assess the damages as an incident to the proceedings in the injunction suit, or whether, on the other hand, the party may not be required to bring a new suit on the bond in a court of law. In a considered *dictum* on this point, the supreme court declared, in 1851, that the remedy on the bond is exclusively at law,⁵⁸ and this suggestion has sometimes been acted on.⁵⁹

§ 2421. Present Practice in Federal Courts.

But at a later day, the supreme court receded from its former position and stated that in a case of this kind it is within the discretion of the court of equity itself to assess the damages on the bond, referring the cause to a master for that purpose, if need be; or if the court sees fit, it may remit the party to his action at law on the bond.⁶⁰ The English court of chancery has long been accustomed to have the damages assessed upon the bond, under its own direction; and this is decidedly a better practice than that which compels the party to go into another forum.⁶¹ It has been said that only in exceptional cases should the cause be even sent before a jury.⁶²

⁵⁸ *Bein v. Heath* (1851) 12 How. 168, and having possession of the principal case, it is fitting that it should have 179, 13 L. ed. 939, 944.

⁵⁹ *Merryfield v. Jones* (1855) 2 Curt. C. C. 306.

⁶⁰ *Cimotti Unhairing Co. v. American Fur Refining Co.* (1908) 158 Fed. 171.

In *Russell v. Farley* (1881) 105 U. S. 445, 26 L. ed. 1064, Mr. Justice Bradley, in explaining the basis of the authority of the court to assess the damages incurred under the bond, said: "The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case;

⁶¹ *West v. East Coast Cedar Co.* (C. C. A.; 1902) 51 C. C. A. 416, 113 Fed. 742; *Lea v. Deakin* (1892) 13 Fed. 514. Compare *Deakin v. Stanton* (1879) 3 Fed. 435.

⁶² *Coosaw Min. Co. v. Farmers' Min. Co.* (1892) 51 Fed. 107,

§ 2422. By What Law Liability Determined.

An injunction bond given in an equity cause pending in a federal court is to be construed in conformity with the principles of law applicable thereto, as determined by the supreme court. This rule applies as well where an independent action is brought on the bond in a state court as where the liability is to be determined by the court granting the injunction.⁶³

§ 2423. Federal Question.

An injunction bond given under the order of a federal court of equity is a bond executed in and by virtue of an authority exercised under the laws of the United States. Consequently the matter of liability on such a bond is a federal question, and the supreme court of the United States has the power to review the action of a state court in determining it.⁶⁴

§ 2424. Retrospective and Prospective Obligation of Bond.

Whether the injunction bond given under an order of the court after the suit is in progress covers only such damage as is incurred after the bond is given or whether, on the other hand, it covers all damage incurred by reason of the injunction before as well as after the giving of the bond, is a matter to be determined from the terms of the order and the bond itself construed together. The court can make the bond either prospective only or effective from the beginning. Undoubtedly the surety cannot be held beyond the terms or legal effect of his engagement; and when his contract clearly has reference to a matter contemplated as arising in the future, it is to be interpreted prospectively and not retrospectively. But if the subject of guaranty is, in whole or in part, a past transaction, and the language of the engagement is broad enough to cover the past liability, it will be so construed.

Meyers v. Block (1887) 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. 525: The order for the injunction bond was that the plaintiff should give security "to save the parties harmless from the effects of said injunction." The condition of the bond was to pay "all such damages as he [the obligee] may recover against us in case it should be decided that the said writ of injunction was wrongfully issued." It

⁶³ *Tullock v. Mulvane* (1902) 184 U. S. 497, 46 L. ed. 657; *Leslie v. Brown* (C. S. 497, 46 L. ed. 657, 22 Sup. Ct. 372. C. A.; 1898) 32 C. C. A. 556, 90 Fed.

⁶⁴ *Tullock v. Mulvane* (1902) 184 U. S. 171.

was held that this bond covered all the damage resulting from the injunction prior to as well as subsequent to the giving of the bond.⁶⁵

§ 2425. Elements of Recoverable Damage.

Damages incurred by the defendant in an injunction suit by reason of counsel fees, solicitor's fees, or attorney's fees expended in defending the suit, cannot be recovered in the action or proceeding upon the bond.⁶⁶ But the plaintiff may recover for time lost during the period of the injunction, and for proper expenses incurred in securing witnesses for the purpose of resisting the injunction and for the purpose of getting it set aside.⁶⁷

Purely conjectural damages will not be allowed for the wrongful suing out of an injunction. Speculative profits that might have been earned by mining operations, if they had not been enjoined, are of this sort.⁶⁸

§ 2426. Damage Incident to Delay of Suit.

If the hearing in an injunction suit is unduly delayed by improper conduct on the part of the defendant, the latter, in a suit on the injunction bond, cannot recover damage that has resulted from the delay chargeable to himself. But where the delay in the trial of the suit appears to be equally chargeable to the negligence of the plaintiff, the consideration just mentioned is not to be given weight.⁶⁹

⁶⁵ An obligation of an injunction bond was conditioned to "abide the decision which shall be made thereon [i. e., in the original suit], and pay all sums of money, damages, and costs, that shall be adjudged against them, if said injunction shall be dissolved." Said injunction was dissolved and the bill dismissed.

⁶⁶ Missouri etc. R. Co. v. Elliott (1902) 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. 446; Tullock v. Mulvane (1902) 184 U. S. 497, 46 L. ed. 637, 22 Ct. 372; Arcambel v. Wiseman (1796) 3 Dall. 306, 1 L. ed. 613; Oelrichs v. Spain (1872) 15 Wall. 211, 21 L. ed. 43; Sullivan v. Cartier (C. C. A.; 1906) 77 C. A. 448, 147 Fed. 222. In Linde-

⁶⁷ Sullivan v. Cartier (C. C. A.; 1906) 77 C. C. A. 448, 147 Fed. 222.

⁶⁸ As to the elements of damage that may and may not properly be taken into consideration in assessing damages on an injunction bond, see Lehman v. Mc-

Quown (1887) 31 Fed. 138; Allen v. Jones (1897) 79 Fed. 698; Jones v. Al-

Browning v. Porter (1881) 12 Fed. 460; len (C. C. A.; 1898) 29 C. C. A. 318,

⁶⁹ Swift v. Kortrecht (C. C.

85 Fed. 523; Hays v. Fidelity etc. Co. (C. C.

429; Hays v. Fidelity etc. Co. (C. C.

112 Fed. 709, 50 C. C. A. 429; Hays v. Fidelity etc. Co. (C. C.

112 Fed. 872, 50 C. C. A. 429; Hays v. Fidelity etc. Co. (C. C.

569.

⁶⁸ Coosaw Min. Co. v. Carolina Min.

Co. (1896) 75 Fed. 860.

⁶⁹ Jones v. Allen (C. C. A.; 1898) 85

Fed. 523, 29 C. C. A. 318.

berg v. Howard (1906) 77 C. C. A. 23,

2427. No Recovery for Damages Not Specified in Declaration.

In an action upon an injunction bond, if the plaintiff specifies certain heads or sorts of damage as the ground of his suit, the recovery must be limited to such items as fall under those heads.⁷⁰

§ 2428. Power of Court to Remit Liability on Bond.

We have elsewhere seen that the court of equity has inherent power, in the exercise of its discretion, to impose terms upon either or both of the parties as a condition of the granting or dissolution of an injunction.⁷¹ From this principle of the inherent power of the court to impose terms, there is deduced a corollary to the effect that the court has complete control over those terms and may mitigate or refuse to enforce them, if in the further exercise of its discretion it sees fit to do so. That which can bind can unbind, and "the power to impose a condition implies the power to relieve from it."

Russell v. Farley (1881) 105 U. S. 442, 26 L. ed. 1063: "If, for example," says the supreme court, "it is deemed proper, upon an application for an injunction, to require, as a condition of granting or withholding it, that a sum of money should be paid into court, or that a deed or other document should be deposited with the register, and the developments of the case are afterwards such as to make it manifestly unjust to retain the fund or document and deprive the owner of its use, the court assuredly has the power (though, undoubtedly, to be exercised with caution) to order it to be delivered out to the party. When the pledge is no longer required for the purposes of justice, the court must have the power to release it, and leave the parties to the ordinary remedies given by the law to litigants *inter se*. . . . On general principles the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice to deny to the court the power to supersede the stipulation imposed."

§ 2429. Remission of Liability Discretionary.

It follows that the mere fact that an injunction has been dissolved does not necessitate the giving of damages for the wrongful suing out

⁷⁰ *Sullivan v. Cartier* (C. C. A.; 1906) 77 C. C. A. 448, 147 Fed. 222. ⁷¹ See, *ante*, §§ 2362-2364.

of the injunction. The court may, in its discretion, refuse to give damages if there was reasonable ground for suing out the injunction, and it appears to the court that its process was not improperly used.⁷² The action of the court, in deciding to relieve a party from the obligation of a bond, on the ground that the situation appears to be one where damages should not be given, is subject to review on appeal; but the matter is one bordering so closely upon pure discretion that the appellate court will not reverse except for very manifest error.⁷³

§ 2430. Surety Must Have Day in Court.

If the court of equity which has exacted an injunction bond undertakes to enforce the same and award damages for the wrongful suing out of the injunction, the sureties on the bond must be brought in and allowed their day in court, at least in all cases where the proceeding involves the determination and assessment of unliquidated damages and where the amount of the recovery on the bond is not certain.⁷⁴ If the sureties be not so brought in, the recovery must be against the principal alone.⁷⁵

§ 2431. Estoppel of Surety.

The law and facts of the case as settled by the court in which the injunction bond is given are conclusive on the sureties when sued on the bond. They are not permitted to go behind the decree and question its propriety. For instance, they cannot set up the defense that the agreement on which the decree was founded was illegal.⁷⁶

§ 2432. Surety's Right to Indemnity.

The surety on an injunction bond cannot maintain a bill in equity in the nature of a bill *quia timet* against his principal to compel the latter to indemnify him against anticipated loss or liability. The implied legal obligation to indemnify arises only when the liability of the surety has been fixed.⁷⁷

⁷² Coosaw Min. Co. v. Carolina Min. Co. (1896) 75 Fed. 880.

⁷⁶ Oelrichs v. Spain (1872) 15 Wall. 211, 229, 21 L. ed. 43, 44.

⁷³ Russell v. Farley (1881) 105 U. S. 446, 26 L. ed. 1084; West v. East Cedar Co. (C. C. A.; 1902) 51 C. C. A. 416, 113 Fed. 742.

⁷⁷ American Bonding etc. v. Logansport etc. Gas Co. (1889) 95 Fed. 49. There was an express covenant in this case to indemnify the surety, but the court held that it went no further than the implied obligation.

⁷⁴ Leslie v. Brown (C. C. A.; 1898) 22 C. C. A. 556, 90 Fed. 171.

⁷⁵ Terry v. Robbins (1903) 122 Fed. 725.

*Final Injunction.***§ 2433. Incident of Final Decree.**

An injunction is permanent or final only when the order is entered at the hearing on the merits and is made a part of the final decree.⁷⁸ Being a part of the final decree, the final injunction abides the fate of the decree itself.⁷⁹

§ 2434. Defense after Pro Confesso.

A defendant who has made no appearance in a suit for an injunction until a decree *nisi* for a perpetual injunction has been entered upon a *pro confesso* may come in at any time before the decree is made absolute and file his answer. This is a matter of right and not of favor.⁸⁰

§ 2435. Final Decree Not Concluded by Preliminary Decree.

In determining whether a perpetual injunction shall be granted, the court is not bound by its previous decision in the matter of a motion for a preliminary injunction, that ruling being always open to review or reversal at the final hearing.⁸¹ But as a matter of judicial consistency the decision of the court upon application for the preliminary injunction will be adhered to at the final hearing where the case made at such hearing is substantially the same as at the preliminary hearing, no new facts being introduced that would require a modification of the previous decree.

§ 2436. Considerations Affecting Right to Final Injunction.

As regards the principle governing the right to final injunctive relief, it may be observed that the considerations upon which the courts act are here quite different from those that control upon the hearing of an application for a preliminary injunction.⁸² The preliminary injunction, as we have already learned, is a purely provisional remedy; and it is granted upon the situation as presented to the court at the time the application is made, and with a view to the preservation of possible rights that might be lost if a temporary

⁷⁸ Adams *v.* Crittenden (1881) 17 Fed. 42. ⁸¹ Rodgers *v.* Pitt (1904) 129 Fed. 932, 936.

⁷⁹ Buffington *v.* Harvey (1877) 95 U. S. 99, 24 L. ed. 381. ⁸² Colorado Eastern R. Co. *v.* Chicago etc. R. Co. (C. C. A.; 1905) 73 C. C. A.

⁸⁰ Mason *v.* Jones (1847) 1 Hayw. & 132, 141 Fed. 898. H. 323, Fed. Cas. No. 9,239.

injunction were not granted. The right to a final and permanent injunction, however, will only be recognized where the plaintiff at the final hearing clearly makes out his title to relief. The facts justifying the writ must be clearly established.⁸³

§ 2437. Balance of Convenience Not Determinative.

The doctrine of the balance of convenience or injury, which often determines the granting or refusal of a preliminary injunction, has little or no application on final hearing. After all the proofs have been taken and the cause heard, the question of injunction or no injunction becomes a question of right. Rights are not to be measured, so it is said, by their money value, neither are wrongs to be tolerated because it may be much to the advantage of the wrongdoer. If the court is satisfied that the plaintiff's right is established, that the injury to him is substantial, and that pecuniary damages would not afford adequate redress, the injunction will be granted though the enforcement of it will evidently entail much loss on the other party. The fact that the defendant has invested considerable money in the business or property in respect to the use of which the injunction is granted supplies no conclusive reason for refusing it.⁸⁴

§ 2438. When Granting of Permanent Injunction Discretionary.

But though, as a general rule, the granting of a permanent injunction is governed by a consideration of the respective naked rights of the parties and the injunction will usually be granted in any case where a clear right in the plaintiff and a violation of that right on the part of the defendant are shown; yet situations are sometimes presented where the court, in the exercise of its equitable powers, will treat the granting of the permanent injunction as a matter of discretion, and will refuse the injunction if it appears that the granting of it would work an injury to the defendant, or the public, vastly out of proportion to the benefit that would inure to the plaintiff. But this can only be done, probably, where the defendant has a remedy at law to recover damages for the wrong done to him.

McCarthy v. Bunker Hill etc. Co. (1906) 147 Fed. 981: In a suit to abate a nuisance resulting from the pollution of a stream by mining operations conducted

⁸³ *McCarthy v. Bunker Hill etc. Coal less the fraud is clearly established. Co. (1906) 147 Fed. 981, 984.* *Gaines v. Nicholson (1850) 9 How. 366,*

A perpetual injunction against the 13 L. ed. 172. *prosecution of an action at law will not be granted on the ground of fraud, un-* ⁸⁴ *U. S. v. Luce (1905) 141 Fed. 385, 416.*

by the defendant, it appeared that many millions of dollars had been invested in the business, which had been established long before the plaintiffs acquired the properties injuriously affected by the pollution. Many thousands of persons were employed about the mine; and if the injunction had been granted, the business would have been stopped, to the serious detriment of such employees and to others in the community. The injunction was refused.⁸⁵

§ 2439. Form of Decree—Retention of Jurisdiction over Injunction.

The decree granting a permanent injunction will be so framed and adapted as to subserve the end in view without unduly interfering with the party against whom the relief is granted. And the court may retain the cause, in order that it may from time to time take cognizance of the situation and see that its object is not thwarted.

United States v. Luce (1905) 141 Fed. 385, 422: In a suit for an injunction to abate a nuisance created by odors from a fish factory the court found in favor of the plaintiff, but it was loath to stop the operation of the factory altogether and thereby destroy the defendant's business. Accordingly a decree was drawn enjoining the defendants from the operation of the factory, unless with due use of deodorizers and disinfectants and with due attention to the combustion of noxious odors, etc., so as thereby the nuisance might be abated. And the court entered an order retaining full control over the cause to the end that it might make future orders and decrees necessary to the final suppression of the nuisance.

§ 2440. Modification of Injunction upon Change of Conditions.

If a new situation arises, after a decree granting a permanent injunction has been entered, whereby the injunction becomes inapplicable and the enforcement of it unjust, the court will modify the same, provided an application for a rehearing and modification, or for review, is brought in time. But if the court has, by the affluxion of time, lost jurisdiction to entertain the application, then the proper course for the party against whom the injunction was granted to pursue is, if he is so advised, to proceed to do the act enjoined; whereupon if he is brought up in contempt proceedings, he will be permitted to show that by reason of the changed circumstances the injunction is no longer applicable.⁸⁶

§ 2441. Supplemental Bill by Person Deriving Title from Plaintiff.

Where a perpetual injunction is granted in favor of the owner of real property to prevent unlawful trespasses thereon by the defend-

⁸⁵ Compare *New York City v. Pine* ⁸⁶ *Hatch v. Willamet Iron Bridge Co.*
(1905) 185 U. S. 93, 46 L. ed. 820, 22 (1886) 27 Fed. 673. But see *post*, §
Sup. Ct. 593; *Mountain Copper Co. v. 2487.*
U. S. (C. C. A.; 1906) 73 C. C. A.
621, 142 Fed. 630.

ant, a subsequent purchaser of that property, deriving title from the plaintiff in the injunction suit, may get the benefit of the former decree by means of a supplemental bill or bill in the nature of a supplemental bill. In this bill he should show the derivation of his title from the original plaintiff and that the land in question was included in the former decree. In such a proceeding the former decree of injunction is made effective in favor of the new proprietor; and a new injunction deriving from and based on the original injunction is not granted. It has been held that a petition for a new injunction based on the prior injunction is informal and unsanctioned by good practice.⁸⁷

§ 2442. Supplemental Bill against Person Deriving from Defendant.

If the defendants in a suit for an injunction form a corporation while the suit is pending and transfer to it all their interest in the business in respect to which the injunction is sought, the corporation must be brought in by supplemental bill, or relief cannot be granted against it.⁸⁸

§ 2443. Second Suit for Injunction.

The filing of a suit to restrain a renewed trespass upon real property does not waive the benefit of an injunction previously obtained by the same plaintiff against the same defendant in respect of former trespasses of a slightly different character on the same property.⁸⁹

⁸⁷ *Leverich v. Mobile* (1903) 122 Fed. 549. ⁸⁸ *Bond v. Pennsylvania Co.* (C. C. A.; 1903) 61 C. C. A. 356, 126 Fed. 749. ⁸⁹ *Corbin v. Taussig* (1905) 137 Fed. 151.

CHAPTER LX.

CONTEMPT.

General Principles.

- § 2444. Contempt in General.
- 2445. Nature and Limits of Power to Punish Contempt.
- 2446. Statute Concerning Punishment of Contempt.
- 2447. Purpose of Statute—Newspaper Comments on Trial.
- 2448. Obstruction of Justice—How Punished.
- 2449. Punishing Contempt as Independent Crime.
- 2450. Punishment of Contempt by Offended Court.
- 2451. Contempt Proceedings as Due Process of Law—Jury Trial.

Contempt of Injunction.

- 2452. Violation of Injunction as Contempt of Court.
- 2453. Notice of Injunction.
- 2454. Sufficiency of Injunctive Order as Affecting Charge of Contempt.
- 2455. Who May Institute Contempt Proceedings.
- 2456. Against Whom Contempt Proceedings Maintainable.
- 2457. Basis of Power to Punish Nonparties.
- 2458. Two Elements Involved in Contempt of Injunction.
- 2459. No Person Punishable unless Included in Injunction.
- 2460. Stranger Punishable Only by Virtue of Privity with Defendant.

Proceedings Incident to Punishing Contempt.

- 2461. Direct Contempt—Summary Proceedings.
- 2462. Indirect Contempt—Affidavit and Rule to Show Cause.
- 2463. Same—Affidavit and Motion to Commit.
- 2464. Mode of Proceeding in English Chancery.
- 2465. Motion May Be Made in Vacation.
- 2466. Notice of Motion to Attach for Contempt.
- 2467. Waiver of Notice.
- 2468. Technical Pleadings Unnecessary in Contempt Proceedings.
- 2469. Affidavit in Support of Motion.
- 2470. Entitling Proceedings in Contempt Cases.
- 2471. Contents of Motion or Petition to Commit.
- 2472. Nonparty Proceeded against as Party.
- 2473. Defense to Contempt Proceedings.
- 2474. Sufficiency of Defense.
- 2475. Mode of Proof.
- 2476. Plaintiff's Right to Discovery.
- 2477. Reference to Master.
- 2478. Burden and *Quantum* of Proof.
- 2479. Weight of Defendant's Answer—Rule in Proceedings at Law.
- 2480. Same—Rule in Court of Equity.

- § 2481. Question Pretermitted to Final Hearing.
- 2482. Specific Acts Constituting Violation of Injunction.
- 2483. Matters Not Available as Defenses—Irregularity or Impropriety of Injunction.
- 2484. Same—Dismissal of Cause on Merits.
- 2485. Same—Alleged Misunderstanding of Decree.
- 2486. Same—Instructions of Superior.
- 2487. Same—New Matter Justifying Modification of Injunction.
- 2488. Intention as Affecting Guilt of Contemnor.
- 2489. Total Want of Jurisdiction Available as Defense.
- 2490. Collateral Attack on Jurisdiction Not Permitted.
- 2491. Recitals of Order.

Punishment of Contempt.

- 2492. No Suspension of Punishment Allowed.
- 2493. Punishment by Fine or Imprisonment.
- 2494. Fine against Corporation—Voluntary Society.
- 2495. Criminal and Civil Element in Fine.
- 2496. Mode of Review in Appellate Court.
- 2497. Considerations Affecting Amount of Compensatory Fine.
- 2498. Disposition of Compensatory Fine.
- 2499. Discretion as to Amount of Punitory Fine.
- 2500. Disposition of Compensatory and Punitory Fines on Appeal.
- 2501. Nominal Damages.
- 2502. When Compensatory Damages Alone Allowed.
- 2503. Mitigating Circumstances.
- 2504. Authority of President to Pardon and Remit Punishment.

General Principles.

§ 2444. Contempt in General.

Any wilful disregard of the rightful authority of a court or disobedience to its lawful order is said to be a contempt of court.¹ The offense is in the nature of a crime, the commission of which subjects the offender to punishment by fine or imprisonment. The present chapter is chiefly concerned with contempts incurred by the violation of injunctions; but within certain limits, the principles governing the procedure in such cases are applicable to all contempts.

§ 2445. Nature and Limits of Power to Punish Contempt.

The power to punish for contempt is perhaps the highest exercise of judicial authority, and it belongs to judges of courts of record and

¹ Disobedience to the legitimate authority of the court is a contempt, unless the party can show sufficient cause to excuse it. *Wartman v. Wartman* (1853) 370.

to superior courts generally.² Its existence is essential to the preservation of order in judicial proceedings and the due administration of justice.³ The moment the federal courts were called into existence and invested with jurisdiction over any subject, they became possessed of this power.⁴ But it can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in official transactions, and to enforce obedience to their lawful orders, judgments, and processes.⁵

§ 2448. Statute Concerning Punishment of Contempt.

The conditions under which the federal courts have authority in this respect are defined and limited by the following statute.

Revised Statutes, section 725: The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.⁶

§ 2447. Purpose of Statute—Newspaper Comments on Trial.

On the whole, the foregoing statute must be considered to be merely declaratory of general principles already recognized and established by the courts; but in one respect it embodies a substantial limitation upon the authority of the federal courts. Thus, before the passage of this act, it was held that any publication, pending a suit, reflecting on the court, the jury, the parties, the officers of the court, or counsel, which would tend to influence the decision of the controversy one way

² *In re Mason* (1890) 43 Fed. 515.

³ *Interstate Commerce Comm. v. Brimson* (1894) 154 U. S. 447, 38 L. ed. 1047; *In re Nevitt* (C. C. A.; 1902) 54 C. C. A. 622, 117 Fed. 448; *In re Perkins* (1900) 100 Fed. 950.

⁴ *Ex parte Robinson* (1873) 19 Wall. 510, 22 L. ed. 207, Mr. Justice Field remarked that this statute undoubtedly applies to the circuit and district courts; but he queried whether it could be held to limit the authority of the supreme court, which derives its existence and powers from the constitution.

⁵ *Eisenbecker v. District Court of Plymouth County* (1890) 134 U. S. 31, 33 L. ed. 801.

⁶ *Ex parte Robinson* (1873) 19 Wall. 511, 22 L. ed. 208; *Boyd v. Glucklich* (C. C. A.; 1902) 53 C. C. A. 451, 116 Fed. 136.

⁶ In *Ex p. Robinson* (1873) 19 Wall. take it away entirely.

or the other, could be punished as a contempt.⁷ The exercise of this power by one of the federal judges⁸ during the first half of the nineteenth century led to the preferring of articles of impeachment against him and to his consequent trial before the Senate. The impeachment proceedings were not successful, but the incident led to the passage of this statute. It was intended by this enactment to prevent the courts from unduly interfering with newspaper comments on trials.⁹ Under this act, a critic¹⁰ of judicial acts that amounts to no more than a libel on a court or its officers cannot be punished as a contempt;¹¹ yet the court can exclude from within the bar any persons coming there to report testimony during the trial.¹²

§ 2448. Obstruction of Justice—How Punished.

There is one class of contempts expressly indictable as crimes against the United States, and punishable in independent criminal proceedings brought expressly for such purpose. These are concerned with the obstructing of justice and are dealt with in sections 5394 and 5398–5448, of the Revised Statutes. Such offenses are subject to prosecution upon indictments brought on the law side of the court, and are punishable by the fine and imprisonment provided in these several sections.

Where an offense is of such nature as to be indictable as an obstruction of justice and also such as to be at the same time punishable as a contempt of court under section 725 of the Revised Statutes, the mode of punishment provided for the offense when prosecuted as an indictable crime is not exclusive; and either mode of proceeding can be adopted.¹³ But if an offense is of such nature as not to fall under the statutes in regard to the obstruction of justice, it is punishable exclusively under section 725, and the court has no power to impose any other punishment than that prescribed in this section.¹⁴

⁷ Hollingsworth *v.* Duane (1801) 1 U. S. *v.* Holmes (1842) 1 Wall. Jr. Wall. Sr. 77, 100, Fed. Cas. No. 6,616; 1, Fed. Cas. No. 15,383.

⁸ U. S. *v.* Duane (1801) Wall. Sr. 102. ¹¹ Pettibone *v.* U. S. (1893) 148 U. S. 197, 37 L. ed. 419; Savin, Petitioner District Judge for the District of Mis- (1889) 131 U. S. 267, 33 L. ed. 150; *Eas* souri (1822–1836).

⁹ *In re* Edward S. May (1880) 1 Fed. Brule (1895) 71 Fed. 943.

¹² *In re* Edward S. May (1880) 1 Fed. Brule (1895) 71 Fed. 943.

¹⁰ *Eas parte* McLeod (1903) 120 Fed. 512, 22 L. ed. 208, 130; *Eas parte* Poulsen (1835) Fed. Cas. No. 11,350; Morse *v.* Montana Ore Purchasing Co. (1900) 105 Fed. 337,

§ 2449. Punishing Contempt as Independent Crime.

It is universally recognized that a contempt proceeding in the federal court is criminal in its nature, and it is governed by the rules of construction applied in criminal cases.¹⁴ Being a specific criminal offense, any contempt may be prosecuted by indictment, though it is commonly prosecuted upon summary proceedings in the court against which the offense is committed.¹⁵ A commissioner has authority to arrest, imprison, or bail a person charged with a contempt of court, to the same extent as in case of any other criminal offense.¹⁶

§ 2450. Punishment of Contempt by Offended Court.

When a contempt of court is not made the subject of indictment and prosecution in an independent action at law, the proceedings to punish the contemnor must be conducted in the court against whose authority the offense has been committed. The power of the court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience is a special function of that court. A federal court has been said to be the sole judge of a question of contempt committed before it, and no other court may assume to revise its judgment upon the subject; and even the supreme court upon appeal will not review the action of the lower courts in imposing a fine for contempt.¹⁷ No court has jurisdiction to punish a party for a contempt committed in another court.¹⁸ A federal court has no jurisdiction to punish disobedience of an injunction granted by a state court.¹⁹

Where a cause has been to the circuit court of appeals and a mandate from that court has been returned to the lower court, the jurisdiction to punish the violation of an injunction is in the lower court;

¹⁴ *New Orleans v. New York Mail Steamship Co.* (1874) 20 Wall. 392, 22 L. ed. 357; *Ex parte Kearney* (1822) 7 Wheat. 38, 5 L. ed. 391; *In re Mullee* (1869) 7 Blatchf. 23; *Durant v. Washington County* (1869) Woolw. 377; *In re Ellerbe* (1882) 13 Fed. 532; *U. S. v. Atchison etc. R. Co.* (1883) 16 Fed. 853; *U. S. Berry* (1885) 24 Fed. 783; *In re Ellerbe* (1882) 13 Fed. 530; *In re Ellerbe* (1882) 13 Fed. 530; *In re Kirk v. Milwaukee Dust Collector Mfg. Co.* (1885) 26 Fed. 505. ¹⁵ *U. S. v. Jacobi* (1871) 1 Flipp. 108; *In re Nevitt* (C. C. A.; 1902) 54 C. C. A. 622, 117 Fed. 448. ¹⁶ *Acker* (1894) 66 Fed. 290; *Castner v. Pocahontas Collieries Co.* (1902) 117 Lean 342. ¹⁷ *Boyd v. U. S.* (1886) 116 U. S. 618, 29 L. ed. 746; *New Orleans v. New York Mail Steamship Co.* (1874) 20 Wall. 392, 22 L. ed. 357; *In re Castner v. Pocahontas Collieries Co.* (1902) 117 Fed. 184. ¹⁸ *Ex p. Bradley* (1868) 7 Wall. 364, 19 L. ed. 214; *U. S. v. Green* (1898) 85 Fed. 859; *In re Litchfield* (1882) 13 Fed. 387, 22 L. ed. 354; *Cuddy, Petitioner v. McLeod v. Duncan* (1852) 5 McLean 342.

and the circumstance that the appellate court has modified the terms of the injunction as originally granted by the lower court does not affect this jurisdiction.²⁰

§ 2451. Contempt Proceedings as Due Process of Law—Jury Trial.

The action of a court of equity in committing a party for contempt, upon a hearing before the court itself, in accordance with the ancient practice of courts of chancery, is not subject to criticism as imposing punishment without due process of law.²¹ The accused does not have the right, in such case, to insist that he shall be tried in any other court or in any other way than that which the equity court, in accordance with its practice, may see fit to adopt. To be specific, proceedings for contempt have never been subject to the right of trial by jury; and a person brought up for contempt has no right to insist that he shall be so tried.²²

In re Debs (1895) 158 U. S. 564, 594, 39 L. ed. 1092, 1106: It was insisted that to deprive the accused of a jury trial for such an offense operated to deprive him of his constitutional right. Mr. Justice Brewer met this contention thus: "But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

Contempt of Injunction.

§ 2452. Violation of Injunction as Contempt of Court.

Disobedience to an injunction is a contempt of court and may be punished by fine or imprisonment.²³ Aiding, advising, or persuading another to do a forbidden act is also a contempt and punishable as such.²⁴ But an attorney is not deemed to be guilty of a contempt for

²⁰ *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* (C. C. A.; 1903) 61 C. C. A. 57, 124 Fed. 735.

²¹ *Eilenbecker v. Plymouth Co.* (1890) 134 U. S. 31, 33 L. ed. 801.

²² *Ex p. Terry* (1888) 128 U. S. 289, 32 L. ed. 405; *Savin, Petitioner* (1889) 131 U. S. 267, 33 L. ed. 150. *Cuddy, Petitioner* (1889) 131 U. S. 280, 33 L. ed. 154; *Eilenbecker v. Plymouth County* (1890) 134 U. S. 31, 33 L. ed. 801.

²³ *Atlantic Giant Powder Co. v. Dittmar Powder Mfg. Co.* (1881) 9 Fed. 316; *Wells v. Oregon R. etc. Co.* (1884) 19 Fed. 23; *In re North Bloomfield etc. Co.*

(1886) 27 Fed. 795; *Indianapolis Water Co. v. American etc. Co.* (1896) 75 Fed. 972.

²⁴ *U. S. v. Debs* (1894) 64 Fed. 738; *Bate Refrigerating Co. v. Gillett* (1887) 30 Fed. 683; *Société Anonyme etc. v. Western Distilling Co.* (1890) 42 Fed. 96.

advice given in an honest belief as to the lawful limits of the authority of a court.²⁵

§ 2453. Notice of Injunction.

Before any person can be held liable as for a contempt, it must appear that he had notice of the injunction. Such notice is usually given by serving a copy of the injunction. If notice is not given in this way, it must appear that it was given by some other means. Proof of a giving of notice must be clear, especially where the plaintiff has not proceeded with promptitude.²⁶ The practice of dispensing with personal service of the injunction is permissible only in cases where this is necessary in order that the ends of justice may not be defeated. The relaxation of the rule is not designed to dispense in the slightest degree with the necessity of due notice to those who are intended to be bound by the injunction.²⁷

§ 2454. Sufficiency of Injunctive Order as Affecting Charge of Contempt.

A person cannot be held liable for the violation of an injunction unless the act enjoined is clearly and exactly defined so as to leave no reasonable doubt or uncertainty as to what specific act or thing is forbidden or required.²⁸

§ 2455. Who May Institute Contempt Proceedings.

An injunction obtained to protect a private right is so far within the control of the party obtaining it that only such persons as have a present interest in the right to be protected can be heard to complain of its violation. Where a plaintiff obtains an injunction and then parts with or loses all his interest in the subject-matter of the suit, he cannot thereafter maintain contempt proceedings for a violation of the injunction.²⁹

²⁵ *In re Watts* (1903) 190 U. S. 1, 47 ployers' Teaming Co. v. Teamsters' Joint Council (1905) 141 Fed. 679, 688. L. ed. 933.

²⁶ Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. (C. C. A.; 1903) 124 Fed. 738. ²⁷ *In re Cary* (1882) 10 Fed. 622, 626.

The following cases illustrate situations where persons against whom proceedings were brought have been held to have notice of the injunction. *In re Lennon* (1897) 166 U. S. 554, 41 L. ed. 1113; *Toledo etc. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 395, 54 Fed. 746, 757; *W. B. Conkey Co. v. Russell* (1901) 111 Fed. 417, 423; *Em-*

²⁸ U. S. v. Atchison etc. R. Co. (1905) 142 Fed. 176, 183. Compare *In re Huntley* (C. C. A.; 1898) 29 C. C. A. 468, 85 Fed. 889.

²⁹ *Secor v. Singleton* (1888) 35 Fed. 376 (where the property comprising the subject-matter of the injunction had been foreclosed under a mortgage and the title vested in the purchaser).

§ 2456. Against Whom Contempt Proceedings Maintainable.

The problem now to be considered is indicated in the question, Against whom may contempt proceedings be maintained? The answer to this is not as simple as might appear, and the solution of it in actual practice is sometimes a delicate and difficult matter. The point first to be noted is that a person does not have to be a technical party to the suit in order to be subject to punishment for disobeying an injunction.

1. *In re Lennon* (1897) 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. 658: Mr. Justice Brown laid down this doctrine in language that has often been quoted in the federal courts and uniformly followed: "To render a person amenable," said he, "to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor have been actually served with a copy of it, so long as he appears to have had actual notice."

2. *American Steel etc. Co. v. Wire Drawers' Union* (1898) 90 Fed. 604: Judge Hammond, discussing the effect of an interlocutory injunction as regards the persons on whom it operates, said: "It is one of the features of an interlocutory injunction that it reaches all who are parties, whether they have been served with process of subpoena or not, whether they have appeared or not, whether they have answered or not; and it binds all who have notice of it, whether they are parties or not. It is old as the practice of injunctions that all having notice of it must obey it."

§ 2457. Basis of Power to Punish Nonparties.

The proposition that a stranger to any suit may be punished for violating an injunction granted in such suit has the appearance of a paradox, and it seems to violate the most fundamental principle of legal and equitable procedure. It is a universal principle of jurisprudence that one who is not a party to a suit is not bound by any decree that the court may make in the cause. So carefully is this principle guarded in the federal court that it is expressly provided, in equity rule 48, that even where the parties are numerous and cannot all be brought before the court, persons who are represented in the proceedings but who are not actual parties are not bound by the decree, and the same is without prejudice to their rights and claims. We are now to learn how the courts of equity, while theoretically recognizing the full force of that principle, nevertheless contrive to enforce their injunctions against non-parties.³⁰ To say that a person whose interests and rights are concededly unaffected by a

³⁰ Equity rule 48, which provides that those not made parties may be bound by in class bills the decree shall be without an injunction if they have notice. American Steel etc. Co. v. Wire Drawers' Union (1898) 90 Fed. 598.

decree may yet be punished for disobeying an order granted in the cause certainly seems somewhat self-contradictory; and it is not easy to state the exact principle upon which the two notions can be reconciled. The distinction seems to be found in the difference, on the one hand, between the conception of *res judicata* (according to which a party's interests, rights, and claims to the subject-matter of the suit are concluded by the decree) and the idea, on the other hand, that disobedience to an injunction constitutes an interference with a piece of judicial machinery. The whole doctrine concerning the punishment of contempts, so far at least as it concerns strangers to the suit, rests upon the idea that the courts are organs for the administration of justice, and that all the writs, processes, orders, rules, and commands lawfully issued during the progress of the suit are mere instruments by which the functions, ends, and aims of the courts are accomplished. Any one who wilfully interferes with the operation of these instruments does so at his own peril, and he thereby becomes guilty of a contempt and is subject to punishment for his offense.

§ 2458. Two Elements Involved in Contempt of Injunction.

In order to understand the principle upon which the courts here proceed, it is necessary to bear in mind that, as explained in the following authorities, a contempt of court involves, or may involve, two elements, namely, (1) the violation of the individual right of the litigant in whose behalf the injunction was granted and for whose protection the order was made, and (2) the offense against the majesty and dignity of the court. If the contempt proceedings are brought against a contemnor who is a technical party to the suit, both of these factors enter into consideration; but if the proceedings are instituted against one who is not a party, he can be punished only in so far as his act involves an offense against the court. The violation of an injunction therefore involves, or may involve, both a civil and a criminal aspect. As between the immediate parties to the suit, the injunctive order creates a legal obligation whereby the plaintiff acquires a specific title, or right, as against the defendant, to have the injunctive order respected; and the defendant owes the plaintiff the legal duty to respect it. A violation of that obligation gives rise to a claim on the part of the plaintiff to be compensated for the civil wrong done him. It follows that a party who is actually bound by an injunction is both civilly and criminally liable for its violation; civilly liable for the damages resulting from the breach of the injunc-

tive obligation laid on him in favor of the plaintiff, and criminally liable for his contempt of court and obstruction of justice. On the other hand, as against a person who is not a party to the suit, contempt proceedings are of a purely punitive character.

1. *In re Reese* (C. C. A.; 1901) 47 C. C. A. 87, 107 Fed. 942: The court explained the ground for the rule that one who is not a party to the suit may be punished for obstructing the administration of justice and consequently for violating an injunctive order, in the following words: "It is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order. Such contempts, however, are totally different offenses from those which the parties to the case commit when they disobey a direct order made in a case for the benefit of the complainant. The one is an offense against the majesty and dignity of the law. The other is a violation of the rights of a particular suitor, at whose instance and for whose protection the particular injunctive order disobeyed was issued by the court."

2. *Christensen Engineering Co. v. Westinghouse etc. Co.* (C. C. A.; 1905) 68 C. C. A. 476, 135 Fed. 779: The two different elements entering into contempts involving the violation of an injunction were thus exhibited from another point of view by Wallace, Circuit Judge: "Proceedings of contempt are of two classes—those prosecuted to preserve the power and vindicate the dignity of the courts by punishing the contemnor, and those prosecuted to compel observance and redress the violation of orders or decrees made in behalf of a party to an action pending before the court. The former are punitive and essentially criminal in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly interested in their conduct and prosecution are the individuals whose private rights and remedies they are necessary to redress. The intentional violation of an injunction by a party to the case is an act in defiance of the authority of the court and in derogation of the rights of the adverse party, and a prosecution for contempt in such case may partake of both a punitive and a remedial character. The proceeding is not one to enforce the criminal laws, but is one of a quasi-criminal nature."

3. *Bessette v. W. B. Conkey Co.* (1904) 194 U. S. 324, 48 L. ed. 997: In considering the difference between the two elements that may be involved in contempt proceedings, the supreme court, after quoting with approval the language used by Judge Sanborn in a case decided in the circuit court of appeals,²¹ proceeded to

²¹ *In re Nevitt* (C. C. A.; 1902) 54 classes,—those prosecuted to preserve C. C. A. 622, 117 Fed. 458, 459. In this the power and vindicate the dignity of case, Sanborn, Circuit Judge, observed: the courts and to punish for disobedience "Proceedings for contempts are of two their orders, and those instituted to pre-

add: "If one inside of a court room disturbs the order of proceedings, or is guilty of personal misconduct in the presence of the court, such action may properly be regarded as a contempt of court, yet it is not misconduct in which any individual suitor is specially interested. It is more like an ordinary crime which affects the public at large, and the criminal nature of the act is the dominant feature. On the other hand, if in the progress of a suit a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding. The punishment is to secure to the adverse party the right which the court has awarded to him. . . . It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party."

4. *Seaward v. Paterson* [1897] 1 Ch. 545, 76 L. T. N. S. 215: An injunction was issued against Paterson to restrain him from holding glove-fights or boxing contests on certain premises. One Murray, who had later acquired possession of the premises and conducted boxing contests thereon, was cited for contempt. It was insisted in his behalf that he was neither a party to the action nor an agent or servant of such party, and that consequently he could not be held. He was adjudged guilty of contempt, however, on the ground of knowingly aiding and assisting in doing that which the court had prohibited. In approving of this action on the part of the trial court, the court of appeals drew a distinction between the kind of contempt here complained of and that which consists in a disobedience to an order by a party to the suit. Among other things, Lindley, L.J., after observing that Murray was not a party to the action, either first or last, but that he knew all about the order and was responsible for the violation of it, said: "Now, let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him. He is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction, which was not granted

serve and enforce the rights of private injury. It is directed against the power parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. . . . A criminal real party in interest in the proceeding involves no element of personal contempt."

against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction. . . . I confess that it startled me, as an old equity practitioner, to hear the jurisdiction contested upon the facts in this case. It has always been a familiar doctrine to my brother Rigby and myself that the orders of the court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the court, or by assisting those who are bound by its orders."

§ 2459. No Person Punishable unless Included in Injunction.

The proposition that one who is not a party to a suit may be punished for violating an injunction, or injunctive order, is not to be understood as embodying a proposition to be generally applied in any and every case without regard to its natural and proper limitations. One limitation is to be found in the rule that no person can, as a rule, be held liable for the breach of an injunction unless he is in some way included within the terms of the order. Before the court can punish a man for disobedience, it must speak *to him*. It is not necessary that he should have been mentioned by name; but it is necessary that he should be included under some general term used in describing the persons to whom the order is to apply. It is for this reason that injunctions are usually drawn so as to run against and include the defendants, their agents, attorneys, and servants, and all persons aiding, abetting, or confederating with them.³² An injunction issued against one man enjoining and restraining him and all that give assistance to him or aid and abet him is valid against everybody who lends aid to the person specially enjoined.³³ Injunctive orders are sometimes so drawn as to extend to and include "all persons whomsoever,"³⁴ but unless this broad term is qualified so as to apply only to those conspiring or combining with the defendant, or aiding and abetting him, its efficacy is questionable; or at least such an expression could not properly be extended to any other than those who do in fact act in privity with the defendant or combine and conspire with him or aid him in the violation of the injunction.

³² *In re Reese* (C. C. A.; 1901) 47 C. C. A. 87, 107 Fed. 943. The order here ran against the defendants "and each of them, and all other persons who may combine, confederate, or conspire with said defendants, or either of them." ³³ United States *v. Agler* (1894) 62 Fed. 827. ³⁴ *Chisolm v. Caines* (1903) 121 Fed. 397, 399. But as to this case, see below.

§ 2460. Stranger Punishable Only by Virtue of Privity with Defendant.

It may be laid down as a general rule that one who is not a party to a suit can only be held liable for violation of an injunctive order upon a showing that he occupies a relation of privity with the defendant, as by being his attorney, agent, or servant, or that he has confederated with or has aided or abetted the defendant, in the violation of the injunction. The power of the court to act upon a person not a party to the suit depends on the fact of privity or confederacy; and one who is not alleged to be an aider or abettor of the actual defendant or his agent or servant, cannot be punished.³⁵ A person is not liable to be punished as for a contempt where, not being a party to the suit, he acts independently in violating the injunction, and without any connection with the parties actually enjoined.³⁶ The following case decided in a circuit court holds to the contrary of the proposition just stated; but a careful consideration of the situation involved in this decision will show, we think, that the court here exceeded the proper scope of its powers and went further than sound principles of equity procedure can justify.

Chisolm v. Caines (1903) 121 Fed. 397: A decree had been obtained establishing the plaintiff's title to land and enjoining trespasses thereon. The decree of injunction ran against the defendants, their agents, attorneys, and all persons whomsoever. Afterwards certain persons who were neither parties nor privies to the original suit, but who had notice of the injunction, were brought up for a violation of it. So far as appeared, these individuals acted independently of the defendants, and they were in no respect connected with them, nor with the record. Nor were they alleged to have been aiding or abetting the defendants in the violation of the injunction. It was nevertheless held that they could be punished.

³⁵ "It is only as confederates (that is, aiders and abettors) with the defendants in the bill or some of them that the court has any jurisdiction." *Ez parte Richards* (1902) 117 Fed. 658, 663.

Where a person is proceeded against as one of those denominated in the bill as "unknown confederates," it must appear that such person is engaged in aiding or abetting those who are actual parties. *U. S. v. Agler* (1894) 62 Fed. 824, 828.

³⁶ *In re Reese* (C. C. A.; 1901) 47 C. C. A. 87, 107 Fed. 942. See also *W. B. Conkey Co. v. Russell* (1901) 111 Fed. 417; *Employers' Teamming Co. v. Icamasters' Council* (1905) 141 Fed. 679; *Hutting Sash etc. Co. v. Fuelle* (1906) 143 Fed. 363, 368.

The proposition that a stranger to a suit cannot be punished for a contempt except upon showing of some sort of privity or connection with the party actually enjoined is to be understood as applying to cases involving the violation of injunctive orders granted by the court for the benefit of a litigant. It evidently does not apply to those contempts that consist of criminal offenses against the dignity of the court, such as raising a disturbance in the presence of the court, or resisting an officer in the execution of lawful process, or otherwise interfering with the course of justice. Anybody can of course be taken up and punished for a contempt of this kind.

[The decision appears to be wrong on this point, in any aspect. A court unquestionably has power, under section 725 of the Revised Statutes, to punish any person for disobedience to any lawful order, decree, or command. But we think that before a decree or command can be considered "lawful" as against one who is not a party, he must stand in such relation to the parties of record as to give the court jurisdiction over him. It will be noted that the injunction here violated was a perpetual injunction, and the course pursued by the court in this case was such as in effect to make the decree final and effective against everybody. If the property in controversy had been in the possession of the court at the time of the trespass, or if the court had been exercising jurisdiction *in rem* over the property, the court would no doubt have had power to punish the independent trespassers. But this was not the case. There was one factor involved in this case, however, that is almost sufficient to justify the action of the court. This is found in the circumstance that the suit to determine the title to the property had involved a question of public right, and it might have been argued that these independent trespassers, being a part of the general public, had been concluded by the decree. But the suit was not litigated in a way to make this idea effective; and the court expressly refrained from basing its action on this ground.]

Proceedings Incident to Punishing Contempt.

§ 2461. Direct Contempt—Summary Proceedings.

When a contempt is committed directly in the presence of the court or so near thereto as to obstruct the administration of justice, the court has power to punish the offender by summary proceedings; and in such case the court may adopt such mode of determining the question of guilt as it deems proper, having due regard to the essential rules that prevail in the trial of matters of contempt.⁸⁷ The court may, upon its own knowledge of the facts, without further proof, without issue or trial (and without hearing an explanation of the motives of the offender), immediately proceed to determine whether the facts justify punishment, and to inflict such punishment as seems proper within the limits allowed by law.⁸⁸ The testimony in such a proceeding may be heard orally in open court, if desirable.⁸⁹

§ 2462. Indirect Contempt—Affidavit and Rule to Show Cause.

The practice in regard to the mode of instituting proceedings for acts done in violation of an injunction beyond the precincts of the court has not been uniform throughout the various circuits, though it is everywhere agreed that such proceedings must be begun upon

⁸⁷ Savin, Petitioner (1889) 131 U. S. 267, 33 L. ed. 150. ⁸⁸ Savin, Petitioner (1889) 131 U. S. 269, 33 L. ed. 152.

⁸⁸ Ex p. Terry (1888) 128 U. S. 289, 32 L. ed. 405.

information, motion, petition, or rule to show cause, of which the defendant is required to have due notice. In some of the circuits the practice has long been for the court, upon the filing of an affidavit, or affidavits, charging a person with the violation of an injunction, thereupon to grant a rule requiring such person to appear and show cause why he should not be attached for contempt.⁴⁰

Fanshawe v. Tracy (1868) 4 Biss. 490, Fed. Cas. No. 4,643: "The practice in this district [Illinois] has been, when affidavits are presented charging a person with the violation of an order of the court or of an injunction, for a rule to show cause to issue, requiring him to appear in court and furnish some good reason why an attachment should not be issued against him. It has also been supposed to be within the power of the court to issue an attachment in the first instance without the necessity of a rule to show cause."

§ 2463. Same—Affidavit and Motion to Commit.

In other circuits, a practice has prevailed whereby the party complaining of the violation of the injunction, upon affidavit, moves or petitions the court to commit the defendant for contempt, or that the defendant may stand committed for his contempt, and that an attachment may issue to this end, notice being given of such motion or petition.⁴¹

Gray v. Chicago etc. R. Co. (1864) Woolw. 63, Fed. Cas. No. 5,713: Mr. Justice Miller said: "The proper and regular course for proceeding against persons who are alleged to have committed a contempt of the court in disobeying the command of a writ of injunction, is by motion to commit. The party proceeded against must have due and reasonable notice of this motion before it should be granted. An opportunity to be heard must be given before the party can be deprived of his liberty."

§ 2464. Mode of Proceeding in English Chancery.

The difference between the two modes of proceeding is not very great, nor does it involve any very serious consequences; but the proceeding by motion to commit is the simpler, and this course is more in conformity with the practice of the English chancery.

3 Daniell, Chancery Practice, 372: "Where a party has been guilty of a contempt by the breach of an injunction, the proper course of proceeding, if he be

⁴⁰ See Christensen Eng. Co. v. West-
inghouse etc. Co. (C. C. A.; 1905) 68
C. C. A. 476, 135 Fed. 779.

⁴¹ Worcester v. Truman (1839) Fed. Co. v. Jacksonville etc. R. Co. (1892) 52
Cas. No. 18,043, Fed. 938.

While a motion and rule for attach-

not a peer or otherwise entitled to privilege of Parliament, is to obtain an order for his committal. This order must be obtained on motion, of which notice must have been duly served upon him personally. And it is to be observed that the terms of the notice of motion should be that the party 'may stand committed' to the Fleet prison, for breach of the injunction, and not 'that he may show cause why he should not be committed.' The plaintiff however may, as it seems, obtain an order *ex parte* that the defendant may stand committed on a certain day unless he shows cause against it, which order must be personally served upon the party to be committed. But whether it be the order *nisi* or a notice of a motion for an absolute committal, the service must be personal, unless the defendant has absconded: in which case, an order may be obtained that service on his clerk in court or at his last place of abode shall be deemed good service."

§ 2465. Motion May Be Made in Vacation.

The motion to commit a party for contempt may be made to a judge of the court during vacation; and upon a sufficient showing the judge has authority to award an attachment, as the court is always open for interlocutory proceedings on the equity side, and the granting of an attachment for a contempt is an interlocutory proceeding within the meaning of the rule.⁴²

§ 2466. Notice of Motion to Attach for Contempt.

In the practice of the federal courts, a rule requiring that the person to be attached for contempt shall be personally served with notice of the motion is generally recognized. Thus an attachment for the violation of an injunction has been denied where such person had had no notice of the motion;⁴³ and an order of arrest issued without notice will usually be discharged on motion.⁴⁴ However, the court may, in a proper case, order that substituted service on the solicitor of record,⁴⁵ or by leaving a copy at the defendant's place of abode,⁴⁶ shall be sufficient; and it seems that personal notice is not absolutely essential in any case where the person to be attached is an actual party to the suit and has had due notice of the injunction. Having violated an order of whose existence he was fully aware, he is subject to attachment at any time and without further notice. If the court thinks proper to order substituted service, it would seem to be a mere matter of favor.

⁴² *Vose v. Reed* (1871) 1 Woods 647, ⁴⁴ *Gray v. Chicago etc. R. Co.* (1864) Fed. Cas. No. 17,011. ⁴⁵ *Woolw.* 63, Fed. Cas. No. 5,713.

⁴³ *Lefavour v. Whitman Shoe Co.* ⁴⁵ *Bate Refrigerating Co. v. Gilett* (1894) 65 Fed. 785; *American Constr.* (1885) 24 Fed. 696. ⁴⁶ *Hollingsworth v. Duane* (1801) ⁴⁶ *Co. v. Jacksonville etc. R. Co.* (1892) Wall. Sr. 141, Fed. Cas. No. 6,617. ⁴² Fed. 937.

1. *Eureka Lake etc. Co. v. Yuba County* (1886) 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. 429: An order to show cause why a party should not be punished for contempt in the violation of a restraining order had been granted, but the party against whom the order was made concealed himself so that service could not be had upon him. Upon a return showing this fact, the court ordered that service should be had on his attorney of record.

2. *Christensen Eng. Co. v. Westinghouse etc. Co.* (C. C. A.; 1905) 68 C. C. A. 476, 135 Fed. 774: Contempt proceedings against a party to the suit were resisted on the ground that he had not been duly served with notice of the application for the attachment. His attorneys of record had, however, been given notice, and the plaintiff had forwarded to him a registered letter containing the requisite notice and a copy of the affidavits. This registered letter was returned as "refused." It was held that the attachment and the proceedings were valid. The defendant's attorney presumptively gave his client notice; and, besides, by refusing to receive the registered package the defendant showed that he was aware of the nature of its contents, and thereby put himself in the position of one who concealed himself from process.

§ 2467. Waiver of Notice.

If the defendant in contempt proceedings fails in the court of first instance to raise the question as to whether he had been given proper notice of the motion for attachment, such question is not available on appeal.⁴⁷

§ 2468. Technical Pleadings Unnecessary in Contempt Proceedings.

In contempt proceedings for the violation of an injunction technical pleadings are not required. It is sufficient that by petition, affidavit, or other showing, it is made to appear that there has been a willful violation of the court's order.⁴⁸ The essential thing is the filing of some statement or charge clearly showing the facts necessary to support the contempt proceedings.⁴⁹

§ 2469. Affidavit in Support of Motion.

The motion, application, or petition for an order to commit for contempt should be supported by an affidavit. The motion, or petition, and the affidavit are not infrequently combined into one pleading, and it is therefore sometimes stated that contempt proceedings are properly begun by affidavits.⁵⁰ This is entirely proper. All that is really necessary is that the application be made upon a duly

⁴⁷ *Christensen Eng. Co. v. Westinghouse etc. Co.* (C. C. A.; 1905) 68 C. C. A. 476, 135 Fed. 778. ⁴⁸ *U. S. v. Agler* (1894) 62 Fed. 824, 827.

⁴⁹ *Employers' Teaming Co. v. Teamsters' Joint Council* (1905) 141 Fed. 686. ⁵⁰ *Hammond Lumber Co. v. Sailors' Union* (1906) 149 Fed. 577, 580.

authenticated state of facts. The affidavit is the really important thing, in all cases where the contempt is not committed in the presence of the court; and if the affidavit is sufficient, the motion itself may be made orally.

§ 2470. Entitling Proceedings in Contempt Cases.

If contempt proceedings are instituted against a party to the suit, such proceedings are usually entitled as being in the main equity suit.⁵¹ If the proceedings are instituted against one who is not a party, the motion, petition, or information should likewise be entitled in the main cause; but when he has been attached or found guilty of the contempt, all orders thereafter made in that proceeding should be entitled as in a suit by the government.⁵²

U. S. v. Wayne (1801) Wall. Sr. 134, Fed. Cas. No. 16,654: A motion for an attachment in contempt was overruled because the proceeding was entitled as in a government suit. Said the circuit judge: "The law is, and so is the practice and reason of the thing, that proceedings against a party or some third person for a supposed contempt in the course of a cause must be entitled as in the civil cause: for until the rule is made absolute, or an attachment is issued, there is no suit between the United States and the person charged with a contempt. When the court have adjudged the party in contempt, they direct an attachment, and the future steps are all on the criminal side. Independent of the general propriety of this method, there is a special reason why the procedure should be as between the parties, until the contempt is established; namely, that the party charged may have his costs, if the motion is rejected or the rule refused. Were the United States made the prosecutor in the first instance, the vexation would be unredressed."

§ 2471. Contents of Motion or Petition to Commit.

The motion or petition to commit a person for violation of an injunction should specifically set forth the act or acts that are alleged to constitute the violation; and he cannot be found guilty of a violation of injunction in respect of acts not so set forth. The proceeding is in the nature of a criminal information and it must therefore be specific.⁵³ Technical precision and fullness, however, are not required. All that is necessary is that the person alleged to be in contempt should be sufficiently informed to enable him to make an

⁵¹ *Fischer v. Hayes* (1881) 6 Fed. 63. ⁵² *Huttig Sash etc. Co. v. Fuelle*

⁵³ *U. S. v. Anonymous* (1884) 21 Fed. 761; *Employers' Teaming Co. v. Teamsters' Joint Council* (1905) 141 Fed. man (1848) Fed. Cas. No. 10,759. 685,

intelligent defense, if he has any. It is not necessary to set out the charges with the same particularity as in an indictment.⁵⁴

If a petition for the issuance of an attachment for contempt in the violation of an injunction contains specifications of acts not covered by the injunction, such specifications may be stricken out on motion.⁵⁵

In considering whether the person who is alleged to be in contempt is sufficiently advised, by the proceedings instituted against him, as to the nature of the particular acts that constitute the contempt, reference is to be had not only to the motion, petition, or information, but also to the contents of the accompanying affidavits.⁵⁶

§ 2472. Nonparty Proceeded against as Party.

If the moving papers show a state of facts sufficient to justify punishing one for contempt who is not an actual party to the suit, the circumstance that those papers are erroneously framed with a view to punishing him as a party to the suit is not material. If the party is informed as to the nature of the charge he is to face, his status as a party or non-party is immaterial.⁵⁷

Employers' Teaming Co. v. Teamsters' Joint Council (1905) 141 Fed. 679: A petition for a rule on certain persons to show cause why they should not be adjudged in contempt and attached for violation of an injunction was in the form here indicated and was held good: The petition set up the filing of the bill in which it was prayed that the original defendants, and each and every of their agents and servants, and any and all other persons and associations, be restrained from interfering with, hindering, obstructing, or stopping any of the business of the plaintiff; and the petition made further reference to the prayer of the bill. It then recited the decree for an injunction (issued in the language of the bill). It proceeded further to set out what steps were taken to convey notice to everybody, including persons in the situation of respondents, and charged, upon information and belief, that respondents had actual knowledge of the decree and its terms. It then set out the several acts of the several respondents complained of, supporting the same by affidavits, and prayed that an order might be entered directing respondents severally to show cause by a short rule day why they should not severally be attached for contempt for violating "said temporary stay and injunctive order."

⁵⁴ *Employers' Teaming Co. v. Teamsters' Joint Council* (1905) 141 Fed. 679, questioning *In re Reese* (C. C. A.; 1901) 107 Fed. 942, 47 C. C. A. 87.

⁵⁵ *Hammond Lumber Co. v. Sailors' Union* (1906) 149 Fed. 579.

⁵⁶ *Employers' Teaming Co. v. Team-*

⁵⁷ *Employers' Teaming Co. v. Teamsters' Joint Council* (1905) 141 Fed. 686, questioning *In re Reese* (C. C. A.; 1901) 47 C. C. A. 87, 107 Fed. 942,

§ 2473. Defense to Contempt Proceedings.

The person against whom contempt proceedings are instituted, whether by motion to commit or rule to show cause, is always entitled to be heard.⁵⁸ His defense is usually presented in a sworn answer or in affidavits replying to the information, motion, or petition presented by the party moving against him; and if the affidavits or answer of the respondent fully meet and explain the facts stated in the affidavits of the moving party or the verified petition on which the application is based, the attachment will not be granted.⁵⁹

§ 2474. Sufficiency of Defense.

The defense stated in the respondent's answer or in his affidavits should be such as to meet the case made by the party moving for his committal; and affidavits upon irrelevant and immaterial matters will be disregarded.⁶⁰

§ 2475. Mode of Proof.

On a motion to commit or at the hearing of a rule to show cause why a party should not be committed for contempt, the usual mode by which the facts are made to appear is by the use of affidavits.⁶¹ But the testimony may be more formally taken in the form of depositions or orally, if this appears advisable. The matter is in the discretion of the court.

§ 2476. Plaintiff's Right to Discovery.

In such a proceeding the plaintiff may, on filing interrogatories, have discovery from the defendant. The interrogatories should be confined to the matters specifically charged against the defendant in the motion for attachment.⁶² The defendant is privileged to refuse answering any interrogatory tending to incriminate him.⁶³

§ 2477. Reference to Master.

The taking of testimony on the question of a violation of injunction may be referred to a master with authority to report the

⁵⁸ *Fanshawe v. Tracy* (1868) 4 Biss. 397; *Universal Talking Mach. Co. v. Keen* (1905) 136 Fed. 456; *General Elec-*

⁵⁹ *Whipple v. Hutchinson* (1858) 4 Blatchf. 100. Fed. Cas. No. 17,517. ⁶⁰ *McLaren* (1905) 140 Fed. 876.

⁶¹ *Whipple v. Hutchinson* (1858) 4 Blatchf. 100. ⁶² *Parkhurst v. Kinsman* (1848) 2 Blatchf. 76, Fed. Cas. No. 10,759.

⁶³ *Chisolm v. Caines* (1903) 121 Fed. 63 U. S. v. Debs (1894) 64 Fed. 739.

testimony and his conclusions thereon.⁶⁴ A reference may also be ordered upon any other point material to be determined, as for instance, to ascertain whether the defendant was served with notice of the injunction.⁶⁵ Where the question whether an injunction has been violated is referred to a master, his finding will not be disturbed where the proof is conflicting. If such a reference is unsuccessfully prosecuted, the plaintiff will be charged with costs.⁶⁶

§ 2478. Burden and Quantum of Proof.

The fact of violation of the injunction must be clearly shown. The burden of proof is on the plaintiff, and the defendant is entitled to the benefit of any reasonable doubt. Substantially the same considerations here prevail in regard to the quantum of proof as obtain in criminal proceedings.⁶⁷ "The court must have more than a suspicion that the defendant has violated its injunction before it can hold him to be in contempt,"⁶⁸ and even "strong impressions" are not sufficient to warrant the fixing of liability for such offense.⁶⁹ A trivial and unintentional violation of an injunction by one who has tried in good faith to comply with the order will not be punished.⁷⁰

§ 2479. Weight of Defendant's Answer—Rule in Proceedings at Law.

The right of a party to purge himself of a contempt by his own oath has always been recognized both in courts of law and in courts of equity. But in regard to the weight to be attributed to the sworn answer of the respondent in contempt proceedings, a difference is to be noted between the practice of courts of law and courts of equity. In contempt proceedings at law, the rule has formerly been that the sworn answer of a respondent fully denying the facts on which the contempt proceedings are based is conclusive, and cannot be controverted by other evidence.⁷¹ If the respondent's answer is false, he

⁶⁴ *Hennessey v. Budde* (1897) 82 Fed. 541. ⁶⁸ *General Electric Co. v. McLaren* (1905) 140 Fed. 876, 879.

⁶⁵ *In re Schwarz* (1882) 14 Fed. 787.

⁶⁹ *Cimiotti Unhairing Co. v. Frolloehr* (1903) 121 Fed. 561.

⁶⁶ *Huttig Sash etc. Co. v. Fuelle* (1906) 143 Fed. 363.

⁷⁰ *Edison Electric Light Co. v. Goelet* (1894) 65 Fed. 612.

⁶⁷ *California Paving Co. v. Moliter* (1885) 113 U. S. 609, 618, 28 L. ed. 1106, 1109, 5 Sup. Ct. 618; *Celluloid Mfg. Co. v. Chrolithian etc. Co.* (1885) 24 Fed. 585; *Woodruff v. North Bloomfield Grav- el Min. Co.* (1891) 45 Fed. 129; *Accum- ulator Co. v. Consolidated etc. Co.* (1892) 53 Fed. 793, 796.

⁷¹ *Matter of Pitman* (1852) 1 Curt. C. C. 186, Fed. Cas. No. 11:184; *In re v. Perkins* (1900) 100 Fed. 952; *Boyd v. Glucklich* (C. C. A.; 1902) 53 C. C. A., 451, 116 Fed. 142,

may be prosecuted for perjury, so it has been said, but on the question of the contempt the statements of the answer are to be taken as true.⁷² This singular and unreasonable doctrine has, however, lately been repudiated by the supreme court; and it seems that under the present practice at law the answer of a person charged with contempt is never conclusive within itself as to statements of facts contained in it, and the same may be inquired into in the usual way.⁷³ It has of course always been held that in order to be conclusive the answer must be credible and consistent in itself, and if a respondent states facts in his answer inconsistent with his avowed purpose and intention, the court is at liberty to draw its own inferences from the facts stated.⁷⁴

§ 2480. Same—Rule in Court of Equity.

The courts of equity have never conceded to the answer of the respondent the same conclusive character, for the purpose of purging the defendant of contempt, as was formerly allowed to it by courts of law. In courts of equity the rule is and always has been that the sworn answer of a party charged with contempt is evidence in his favor, but is not conclusive evidence. Consequently it may be contradicted and supported by other testimony, and the question whether or not the party charged with the contempt has exonerated himself is always to be decided upon a careful consideration of all the evidence produced for and against him.⁷⁵

§ 2481. Question Pretermitted to Final Hearing.

The court will not sustain a motion to punish a defendant for violating an injunction where the point whether the act complained of is within the injunctive order or not depends on a question that should clearly not be determined until the hearing on the merits.⁷⁶

§ 2482. Specific Acts Constituting Violation of Injunction.

A violation of injunction by the sale of infringing articles is sufficiently shown where the plaintiff's affidavits show that certain of

⁷² U. S. v. Dodge (1814) 2 Gall. 313. 21 Fed. 761, 768; U. S. v. Debs (1894)

⁷³ U. S. v. Shipp (1908) 203 U. S. 64 Fed. 724, 738; Boyd v. Glucklich (C. C. A.; 1902) 53 C. C. A. 451, 116 Fed. 574, 51 L. ed. 324.

⁷⁴ *In re Edward S. May* (1890) 1 Fed. 131, 142.

⁷⁵ *International Register Co. v. Registering Fare Register Co.* (1903) 125 Fed. 748.

⁷⁶ King v. Vaughan (1780) 2 Doug. 516; U. S. v. Anonymous (1884) Fed. 790.

the infringing articles were found in the hands of a consumer who stated that they were purchased of the defendant at a particular time subsequent to the granting of the injunction and the affidavits of the defendant do not deny that the sale was made.⁷⁷

An order restraining the defendants, members of a labor union, from boarding certain specified ships of the plaintiff and making threats against the seamen thereon is not violated by defendants doing those forbidden acts as against the crews of other ships belonging to the plaintiff.⁷⁸

§ 2483. Matters Not Available as Defenses—Irregularity or Impropriety of Injunction.

A defendant who has disobeyed an injunction cannot justify his disobedience by showing that the injunction was improvidently or erroneously granted. A person must not set an order of the court at naught merely because he thinks it wrong. He should abide by the order while it is in force, and meanwhile make efforts to get it rescinded, by motion to vacate or dissolve.⁷⁹ It is of no avail to the defendant to insist that the injunction, or injunctive order, is broader or more general in its prohibition than is warranted by the bill;⁸⁰ nor is it even sufficient to show that the injunction was based on a statute that turns out to be no law.⁸¹ If the defendant has

⁷⁷ Christensen Eng. Co. v. Westinghouse etc. Co. (C. C. A.; 1905) 68 C. C. A. 476, 135 Fed. 778. Mexican Ore Co. v. Mexican etc. Co. (1891) 47 Fed. 351; Wakelee v. Davis (1892) 50 Fed. 522; Wong Wai v. Williamson (1900) 103 Fed. 384; General Elec. Co. v. McLaren (1905) 140 Fed. 876; Onslow County v. Tolman (1906) 76 C. C. A. 317, 145 Fed. 753; *In re* South Side R. Co. (1874) Fed. Cas. No. 54 Fed. 730, 19 L.R.A. 387; Lake Erie

etc. R. Co. v. Bailey (1893) 61 Fed. 494; United States v. Debs (1894) 64 Fed. 724; Stateler v. California Nat. Bank (1896) 77 Fed. 43; Mackall v. Ratchford (1897) 82 Fed. 41; Champa-plain Const. Co. v. O'Brien (1901) 107 Fed. 333; United States v. Weber (1902) 114 Fed. 950; United States v. Haggerty (1902) 116 Fed. 510; *In re* Fortunato (1903) 123 Fed. 622; *In re* Feeny (1870) Fed. Cas. No. 4,715. ⁷⁹ *In re* Coy (1888) 127 U. S. 731, 32 L. ed. 274; Elliott v. Peirson (1828) 1 Pet. 340, 7 L. ed. 170; *Ex parte* Watson (1830) 3 Pet. 193, 7 L. ed. 650; U. S. v. Debs (1894) 64 Fed. 724; *Ex parte* Lennon (1894) 12 C. C. A. 134, 64 Fed. 320; U. S. v. Agler (1894) 62 Fed. 824; Roemer v. Newman (1883) 19 Fed. 98; Wells v. Oregon R. etc. Co. (1884) 19 Fed. 20, 9 Sawy. 601; Liddle v. Cory (1865) 7 Blatchf. 1; Whipple v. Hutchinson (1858) 4 Blatchf. 190; Callanan v. Friedman (1900) 101 Fed. 321.

⁷⁸ Hammond Lumber Co. v. Sailors' Union (1906) 149 Fed. 579.

In the following cases, the act or conduct complained of was, under the particular circumstances, held not to constitute a violation of the injunction; ⁸⁰ Economist Furnace Co. v. Wrought-Iron Range Co. (1898) 86 Fed. 1010.

⁸¹ U. S. v. Memphis etc. R. Co. (1881) 6 Fed. 237, 240.

doubts as to the effect or scope of the order he should not disregard it, but should apply for a modification or for instructions.⁸²

§ 2484. Same—Dismissal of Cause on Merits.

The circumstance that the injunction was erroneously granted and that the bill is subsequently dismissed on the merits either in that court or in the appellate court does not deprive the court of its power to punish the violation of the injunction as a criminal offense and contempt of the court. But this circumstance may well prove operative on the discretion of the court in regard to such punishment. It has been held that when a suit is dismissed on the merits, the court should remit any fine not purely punitive, such as a fine in a patent infringement case made up of profits realized by the defendant from prohibited sales.⁸³

§ 2485. Same—Alleged Misunderstanding of Decree.

One who is a party to a suit and as such charged with notice of the orders of the court cannot excuse himself when brought up for violation of the injunction by saying that he was misinformed by hearsay as to the nature and extent of the order.⁸⁴ Nor do the courts take kindly the defense embodied in the suggestion that the defendant misconstrued the decree,⁸⁵ especially where its terms appear reasonably clear. A party cannot be permitted to construe the decree to suit himself. He is required to obey it both in the letter and in the spirit. It has been observed that those who undertake to see how near they can come to doing the prohibited act without rendering themselves liable, are very apt to overstep the bounds.⁸⁶ Nevertheless, if there seem to be reasonable grounds for the contention that the order was misunderstood, the court will forego the imposition of the punitive fine and limit its punishment to the assessment of compensatory damages and costs.⁸⁷

§ 2486. Same—Instructions of Superior.

It is no excuse for the violation of an injunction by a person occupying a subordinate position that he acted under the instructions

⁸² Wells, Fargo & Co. v. Oregon etc. ⁸⁴ Economist Furnace Co. v. Wrought-Co. (1884) 19 Fed. 20; Rodgers v. Pitt Iron Range Co. (1898) 86 Fed. 1011; (1898) 89 Fed. 424. ⁸⁶ Craig v. Fisher (1873) Fed. Cas. No.

⁸³ Worden v. Searls (1887) 121 U. S. 3,332. ⁸⁷ American Graphophone Co. v. Wal-

14, 30 L. ed. 853, 7 Sup. Ct. 814. ⁸⁴ Atchison etc. R. Co. v. Gee (1905) 139 Fed. 582, 468.

⁸⁵ Economist Furnace Co. v. Wrought-Iron Range Co. (1898) 86 Fed. 1010.

of a superior. As between the order of the court and the order of the individual the former must be followed.⁸⁸ That a defendant who is charged with the violation of an injunction acted under the advice of counsel is no defense, but the circumstance is one that may rightly be considered on the question of the extent of the punishment to be visited on him.⁸⁹

§ 2487. Same—New Matter Justifying Modification of Injunction.

If, subsequent to the granting of an injunction, new matter arises such as makes the continuance of the injunction inequitable or unjust, the party aggrieved should make an application for a modification of the injunction setting up such new matter. As long as the injunction remains he must obey it in the letter and in the spirit, and he acts at his peril in doing anything forbidden by the injunction.⁹⁰

1. *Muller v. Henry* (1879) 5 Sawy. 464, Fed. Cas. No. 9,916: The defendant had been enjoined from filling up and grading streets under a void authority derived from a certain board. After the issuance of this preliminary injunction the board proceeded to pass another ordinance not subject to the same defects as the former, authorizing the same work as before. The defendant thereupon proceeded, under this second authority, to do the acts that had been enjoined. It was held that he was liable for contempt in the violation of the injunction. Conceding that the new authority was lawful and sufficient, the proper way to proceed was by making application for a modification of the injunction. Said Sawyer, Circuit Judge: "The injunction should be obeyed until it is dissolved by the authority which granted it. Undoubtedly, if a proper showing were made, if the court were satisfied that the injunction should be dissolved, it would be dissolved; but until that is done, the party himself has no right to determine the fact that he has authority to proceed, in violation of the injunction of this court, to perform the acts which have been prohibited."

2. *Rodgers v. Pitt* (1898) 89 Fed. 424: After an injunction had been granted prohibiting the defendant from diverting the water of a river so as to deprive the plaintiff of a certain flow, the defendant acquired a new and independent title to a water right not in litigation in that suit, by virtue of which acquisition he insisted that he now had a better title to that water than the plaintiff. It was held that this gave him no ground for violating the preliminary injunction in question. He should set up a new title and ask for a modification of the injunction. The court observed: "The defendant in this case was bound to obey the injunction, and, when he interfered with the court's order, he was acting at his peril. He certainly ought not to have acted upon his own judgment as to what his rights were, when it was manifest that his acts would, at least, amount to a

⁸⁸ *Sickels v. Borden* (1857) Fed. Cas. No. 12,833. ⁹⁰ *Bowers v. Von Schmidt* (1898) 87 Fed. 293.

⁸⁹ *Ulman v. Ritter* (1896) 72 Fed. 1006.

technical violation of the terms of the injunction. It was not for him to set up his own opinion as to the meaning and effect of the injunction."

§ 2488. Intention as Affecting Guilt of Contemnor.

A defendant who deliberately does the prohibited act will not be permitted to excuse himself by alleging that he had no intention to violate the injunction.⁹¹ "The belief, motive, or intent of the defendant not to violate the injunction does not excuse him if in fact his acts resulted in a violation of it. The breach of the injunction consists in doing the forbidden thing, and not in the intention with which it is done."⁹² The rule as to intention here is analogous to that which prevails in prosecution for crime: the intent required to be proven is not an intent to violate the law, or the order of the court, but to do the act that the law or order of the court forbids.⁹³

The absence of an intention to violate the injunction is relevant only on the question of the amount of punishment.⁹⁴

§ 2489. Total Want of Jurisdiction Available as Defense.

The rule prohibiting the party against whom contempt proceedings are instituted from questioning the propriety and regularity of the order granting the injunction applies in every case where the court acquires essential jurisdiction of the cause and does not exceed its powers. If a court has no power to grant an injunction in the first instance, its order is totally void; and the defendant cannot be punished for contempt in the violation of such injunction. Consequently it is always permissible to show, upon process of contempt, that the court granting the order had no jurisdiction of the suit; and if the court granting the injunction essays to punish a person for refusing to obey it, its action in this regard is subject to collateral attack upon habeas corpus proceedings in the appellate courts.⁹⁵

⁹¹ *Stateler v. California Nat. Bank* U. S. v. Keokuk (1867) 6 Wall. 514, 18 L. ed. 933; *Riggs v. Johnson County* (1867) 6 Wall. 166, 18 L. ed. 768;

⁹² *Rodgers v. Pitt* (1898) 89 Fed. 424, 429. *Pennsylvania v. Wheeling etc. Bridge Co.* (1855) 18 How. 421, 15 L. ed. 435; *Ea p. Rowland* (1882) 104 U. S. 604,

⁹³ *Economist Furnace Co. v. Wrought-Iron Range Co.* (1898) 86 Fed. 1011. 26 L. ed. 861; *U. S. v. Agler* (1894) 62

⁹⁴ *Atlantic Giant-Powder Co. v. Dittmar Powder Co.* (1881) 9 Fed. 316; Fed. 824; *U. S. v. Debs* (1894) 64 Fed. 739; *American Lighting Co. v. Public Service Corp.* (1904) 134 Fed. 129; *U. S. v. Economist Furnace Co.* (1898) 86 Fed. 538.

⁹⁵ *In re Ayers* (1887) 123 U. S. 443, 31 L. ed. 216; *In re Sawyer* (1887) 124 U. S. 200, 31 L. ed. 402; *Ea p. Terry* (1888) 128 U. S. 289, 32 L. ed. 405; *v. Atchison etc. R. Co.* (1905) 142 Fed. 176; *Ea p. Robinson* (C. C. A.; 1906) 144 Fed. 835, 75 C. C. A. 663.

1. *Eas p. Fisk* (1885) 113 U. S. 713, 718, 28 L. ed. 1117, 1119, 5 Sup. Ct. 724, 726; "When, however, a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void. It is well settled now in the jurisprudence of this court that when the proceedings for contempt in such a case result in imprisonment, this court will, by its writ of habeas corpus, discharge the prisoner."

2. *In re Sawyer* (1888) 124 U. S. 200, 8 Sup. Ct. 482, 31 L. ed. 402: One Parsons, who claimed to have been elected police judge of a certain city, filed a bill in equity in the United States circuit court, praying for an injunction to restrain the mayor and councilmen of the city from proceeding further with certain charges against him, or taking any vote on the report of the committee declaring the office of police judge vacant, or appointing any person to fill that office. A temporary restraining order was issued accordingly, which the mayor and council failed to obey. They were cited for contempt, found guilty and adjudged to pay a fine and in default to stand committed to the custody of the marshal. On writ of habeas corpus the jurisdiction of the circuit court over the subject-matter of the suit was challenged. The supreme court held that the circuit court was without jurisdiction to entertain the bill and that consequently a person who disobeyed the restraining order was not subject to punishment as for a contempt. The court pointed out, however, that the mere fact that a court of equity assumes jurisdiction when there is a remedy at law does not deprive its injunction of full force and effect. In order to render the injunction void, the situation must be such that the court of equity has no jurisdiction whatever.

If a court has no jurisdiction at the time the restraining order is granted, the subsequent passage of a statute giving jurisdiction over such matters does not vitalize the original restraining order so as to enable the court to punish the defendant for a violation of the restraining order.⁹⁶

§ 2490. Collateral Attack on Jurisdiction Not Permitted.

If jurisdiction is sufficiently made to appear in the pleadings, and there is nothing in the record to show a lack of jurisdiction on the part of the court, one who is brought up in contempt proceedings cannot, upon habeas corpus, show that the jurisdiction did not exist. Parties to such a collateral proceeding are bound by the jurisdictional averments in the main suit.⁹⁷

⁹⁶ U. S. v. Atchison etc. R. Co. (1905) 41 L. ed. 1112; W. B. Conkey Co. v. 142 Fed. 176. Russell (1901) 111 Fed. 417.

⁹⁷ *In re Lennon* (1897) 166 U. S. 553,

§ 2491. Recitals of Order.

An order or decree adjudging one to be in contempt for the violation of an injunction and imposing a punishment therefor need not recite that the injunction which was violated was a lawful one.⁹⁸

Where the act constituting the violation of an injunction is set forth with sufficient particularity in the affidavit and other papers, the order adjudging the defendant to be guilty of the "contempt alleged" is sufficient without defining the act more specifically. All that is necessary is that the various proceedings and orders should be so related and connected as to determine, by reference, the meaning of the general expression.⁹⁹

Punishment of Contempt.

§ 2492. No Suspension of Punishment Allowed.

The order imposing a fine or ordering imprisonment for the violation of an injunction need not, and ordinarily will not, be suspended until the final disposition of the cause. The person on whom such punishment is laid has his immediate right of appeal, and he is therefore in no position to insist on the suspension of the order.¹⁰⁰

§ 2493. Punishment by Fine or Imprisonment.

Upon adjudging a party to be guilty of a contempt, the court has authority to impose a punishment consisting either of a fine or of imprisonment.¹⁰¹ It cannot impose a punishment consisting of both a fine and imprisonment; but where an order imposes both penalties, the offender is not entitled to his discharge, until he has satisfied at least one of the penalties, by either paying the fine or undergoing the imprisonment imposed by the court.¹⁰²

The order imposing the penalty may be in the alternative, or it may be drawn conditionally, as that the party shall be committed to prison unless by a certain day he shall pay the stated fine. In such case there is no commitment or imprisonment if the fine is paid, and the penalties are not cumulative.¹⁰³

⁹⁸ Fischer *v.* Hayes (1881) 6 Fed. 63. ¹⁰¹ *Ex p.* Robinson (1873) 19 Wall. 505, 22 L. ed. 205; U. S. *v.* Atchison etc.

⁹⁹ Fischer *v.* Hayes (1881) 6 Fed. 63, 70. R. Co. (1883) 16 Fed. 853; *In re Boone* (1897) 83 Fed. 948; U. S. *v.* Green (1898) 85 Fed. 859.

¹⁰⁰ Westinghouse Air Brake Co. *v.* Christensen Engineering Co. (1903) 123 Fed. 632. See Gould *v.* Sessions (1895) 67 Fed. 163, 14 C. C. A. 366. ¹⁰² *Ex p.* Davis (1901) 112 Fed. 139. ¹⁰³ Fischer *v.* Hayes (1881) 6 Fed. 71.

§ 2494. Fine against Corporation—Voluntary Society.

A fine may be awarded against a corporation, and the court is not confined to the remedy against the corporate officers.¹⁰⁴ But the officers can of course be punished also.¹⁰⁵

In contempt proceedings for the violation of an injunction granted against a voluntary association of workmen and individuals who are members of it, a fine cannot be assessed against the association itself, though it is specially named as a defendant, and its officers formally put in an appearance for it.¹⁰⁶

§ 2495. Criminal and Civil Element in Fine.

In assessing a fine for the violation of an injunction two quite different factors frequently have to be taken into consideration, namely, (1) the vindication of the court and its process, and (2) the compensation of the party injured by the violation of the injunction. The first factor is of a purely criminal or punitive character. Where the person alleged to be in contempt is not an actual party to the suit nor a confederate with such, but is attached simply for obstructing the process of the court, the proceeding is wholly criminal and the compensatory element cannot be involved. But where the alleged contemnor is a party to the suit, the proceedings partake both of a punitive and civil character and both elements may well be taken into consideration in assessing the fine. Accordingly it will be found that the courts in this latter class of cases frequently assess part of the fine as a criminal penalty and the other part as compensatory damages in favor of the party aggrieved. It will thus be seen that in so far as the adjudication of a fine imposes a penalty in favor of the government, it is a criminal judgment; and in so far as it imposes a fine in favor of the adverse party in reparation for his loss and damage, it is a civil judgment.¹⁰⁷

¹⁰⁴ U. S. v. Memphis etc. R. Co. individual officers were not mentioned, (1881) 6 Fed. 237. but it appeared that they were in court in that cause.

¹⁰⁵ American Construction Co. v. Jacksonville etc. Co. (1892) 52 Fed. 937: In a suit against a railroad company an injunction had been granted restraining said company, its officers, agents, attorneys, servants, and employees, from doing certain acts. A motion for an attachment for violation of the injunction specified the company and its officers as the offenders, and prayed an attachment against them. The names of the

¹⁰⁶ Allis-Chalmers Co. v. Iron Molders' Union (1908) 150 Fed. 155, 184.

¹⁰⁷ *In re Chiles* (1874) 22 Wall. 168, 22 L. ed. 822.

§ 2496. Mode of Review in Appellate Court.

This discrimination between the two factors involves the further principle that, in so far as the judgment is civil and contemplates the giving of compensatory damages, it is subject to review on appeal in the equity suit; while in so far as it is punitive, it is subject to review only by writ of error. The strict application of this rule would, however, be found to operate with inconvenience, inasmuch as it would not be practicable nor desirable to resort to the separate methods of procedure in a case where the fine involves both elements. Consequently it is held that where the fine in a given case embraces both elements, it may be reviewed as to the compensatory feature even on a writ of error. In other words, whatever the method adopted is, there should not be a partial review.¹⁰⁸

§ 2497. Considerations Affecting Amount of Compensatory Fine.

In assessing a compensatory fine the court has ample discretion. It may, if it sees fit, award a round sum, not based on any proved items of loss or expense, but intended roughly to cover probable loss and expenses. It has been held that when a fine is imposed by way of indemnity, it should not exceed the actual loss incurred by the violation of the injunction, including the expenses of the proceedings necessitated in presenting the offense for the judgment of the court. And there should usually be some evidence before the court as to what those expenses are.¹⁰⁹ For specific instances where the courts have awarded the whole or a part of the fine to the injured party, and for illustrations of the amounts that have been considered proper under different circumstances, the reader is referred to the cases cited below.¹¹⁰ The court will order a reference to ascertain the loss, expense, or injury suffered by the plaintiff by reason of the violation of the injunction, if this course seems desirable.¹¹¹

¹⁰⁸ Matter of Christensen Eng. Co. Sewing Machine Co. (1881) 9 Fed. 698; (1904) 194 U. S. 458, 48 L. ed. 1072; *In re Tift* (1881) 11 Fed. 463; *Searls v. Christensen Eng. Co. v. Westinghouse Worden* (1882) 13 Fed. 716; *In re North etc. Co. (C. C. A.; 1905)* 135 Fed. 781, 68 C. C. A. 476.

¹⁰⁹ *Christensen Eng. Co. v. Westinghouse Air Brake Co. (C. C. A.; 1905)* 135 Fed. 782, 68 C. C. A. 476 (*modifying* (1904) 130 Fed. 735).

¹¹⁰ *Doubleday v. Sherman* (1870) 8 Blatchf. 45, Fed. Cas. No. 4,020; *Ready Roofing Co. v. Taylor* (1878) 15 Blatchf. 94, Fed. Cas. No. 11,613; *In re Mullee* (1869) 7 Blatchf. 23; *Macaulay v. White* etc. Co. (1893) 125 Fed. 247.

¹¹¹ *Wells, Fargo & Co. v. Oregon R. Co.* (1884) 19 Fed. 20.

§ 2498. Disposition of Compensatory Fine.

Where a compensatory fine is assessed it will be ordered to be paid to the clerk for the use of the plaintiff.¹¹²

§ 2499. Discretion as to Amount of Punitory Fine.

The amount of the punitory fine that should be assessed in favor of the government against a party violating an injunction is much more largely a matter of pure discretion than is the amount of the fine assessable in favor of the injured party for purposes of indemnification only. As there is no strict criterion for determining the amount of the punitory fine, the action of the court of first instance will rarely be reviewed, and never unless the amount is clearly excessive.¹¹³

§ 2500. Disposition of Compensatory and Punitory Fines on Appeal.

A compensatory fine assessed in the circuit court must be remitted, when the case is taken up on appeal and the appellate court decides against the right of the plaintiff on the case made in the bill. But the punitory fine assessed as a punishment for the contempt in its criminal aspect will be allowed to stand; or the lower court will be permitted on remandment of the cause to impose such fine, in its discretion.

Worden v. Searle (1887) 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. 814: In a suit for the infringement of a patent a preliminary injunction had been granted. The defendant was then brought up for a violation thereof and a fine was imposed on him. Upon appeal the supreme court reversed the decree and directed that the bill be dismissed. The contempt proceedings in the lower court were taken and entitled in the main suit, and the fine assessed against the defendant for contempt was chiefly composed of an item consisting of profits obtained by the defendant from the prohibited sales. The supreme court held that as this item was an incident of the suit the right of the plaintiff to recover the same was dependent on the right to the injunction. Hence, as the supreme court had found against the plaintiff on this issue, he could not recover that part of the fine. Accordingly, the judgment in respect to the fine was reversed, without prejudice to the right of the lower court to punish the contempt as respects its criminal character.

§ 2501. Nominal Damages.

Where the violation of the injunction is merely technical and the proceedings are brought only to test the legal right, nominal damages have been allowed.¹¹⁴ Such damages are also sometimes awarded

¹¹² *Economist Furnace Company v. Westinghouse Air Brake Co.* (C. C. A.; Wrought-Iron Range Co. (1898) 86 Fed. 1905) 88 C. C. A. 476, 135 Fed. 780. 1010.

¹¹³ *Christensen Engineering Co. v. R. Co.* (1898) 132 Fed. 582. See Rogers

when the violation was not deliberately committed but was due to ignorance or mistake.¹¹⁵

§ 2502. When Compensatory Damages Alone Allowed.

Where the party violating an injunction is guilty of no bad faith punitive damages will not be assessed, though compensatory damages may be awarded.¹¹⁶ But a guilty party will always be charged with the actual costs.¹¹⁷

§ 2503. Mitigating Circumstances.

That the contemnor acted upon advice of counsel in doing an act that amounts to violation of an injunction is not a good technical defense to the contempt proceedings,¹¹⁸ but inasmuch as the matter of fixing the punishment is within the discretion of the court, the consideration that the party accused of the contempt acted honestly and under the *bona fide* advice of competent counsel is usually given a just and proper weight. It goes of course to mitigate.¹¹⁹ The circumstance that the accused acted in entire good faith is especially cogent in case of those who occupy fiduciary relations and who therefore are in no position to be personally benefited by the alleged violation of injunction.¹²⁰

§ 2504. Authority of President to Pardon and Remit Punishment.

A person adjudged guilty of a criminal contempt in disobeying an injunction may be pardoned by the President, and his fine or other punishment remitted.¹²¹ But in so far as the punishment is imposed by the court in respect of the civil wrong, and for the benefit of the party intended to be protected by the injunction, it does not fall within the pardoning power of the President, but remains exclusively within the control of the court by which the punishment was imposed.¹²²

v. Pitt (1898) 89 Fed. 425, 430; Dinsmore v. Louisville etc. R. Co. (1880) 3 Fed. 503.

¹¹⁵ Mors v. Domestic Sewing-Mach. Co. (1889) 38 Fed. 482.

¹¹⁶ Champlain Construction Co. v. O'Brien (1901) 107 Fed. 333; Indianapolis etc. Traction Co. v. Consolidated Traction Co. (1903) 125 Fed. 247, 250.

¹¹⁷ Comly v. Buchanan (1897) 81 Fed. 58.

¹¹⁸ Atlantic Giant Powder Co. v. Dittmar Powder Co. (1881) 9 Fed. 316; Ulman v. Ritter (1898) 72 Fed. 1000.

¹¹⁹ Poogama Sugar-Pine Lumber Co. (1884) 19 Fed. 811.

v. Klamath River Lumber etc. Co. (1898) 86 Fed. 538; Callanan v. Friedman (1900) 101 Fed. 321; Dinsmore v. Louisville etc. R. Co. (1880) 3 Fed. 593; Carstaedt v. United States Corset Co. (1876) Fed. Cas. No. 2,468.

¹²⁰ Vose v. Internal Imp. Fund (1875) 2 Woods 647, Fed. Cas. No. 17,008.

¹²¹ In re Mullee (1880) Fed. Cas. No. 9,911, 7 Blatchf. 23; Fischer v. Hayes (1881) 6 Fed. 63.

¹²² In re Nevitt (C. C. A.; 1902) 117 Fed. 453, 54 C. C. A. 622; Fischer v. Hayes (1881) 7 Fed. 96; Hendryx v. Fitzpatrick (1884) 19 Fed. 811.

CHAPTER LXI.

RECEIVERS.

Receivership in General.

- § 2505. Receiver Defined.
- 2506. Power of Court to Appoint Receiver.
- 2507. Nature and Scope of Receivership Proceedings.
- 2508. General and Special Receivers.
- 2509. Temporary and Permanent Receivers.
- 2510. Judicial Discretion as to Appointment of Receiver.
- 2511. Consent of Parties Not Conclusive.
- 2512. Considerations Bearing on Exercise of Judicial Discretion.
- 2513. Receivership Must Be Necessary.
- 2514. No Receiver upon Mere Dispute as to Title of Property.
- 2515. Insolvency of Defendant.
- 2516. Relative Inconvenience to Respective Parties.
- 2517. Equity of Plaintiff's Cause as Affecting Appointment of Receiver.
- 2518. Laches in Prosecution of Suit.
- 2519. Reluctance of Courts to Appoint Managing Receiver.
- 2520. Appointment of Managing Receiver for Public Corporation.
- 2521. Appointment of Managing Receiver for Private Business.
- 2522. Jurisdiction of Court as Affecting Validity of Receivership Proceedings.
- 2523. Same—Existence of Remedy at Law.
- 2524. Receivership Dependent on Plaintiff's Title to Equitable Relief.
- 2525. Territorial Limit of Jurisdiction over Property.
- 2526. In What District Receiver May Be Appointed.
- 2527. Appointment of Receiver in State Where Corporation Organized.
- 2528. Appointment of Receiver as Affected by State Statutes.

Conflict of Jurisdiction in Receivership Proceedings.

- 2529. Exclusive Authority of Court First Acquiring Jurisdiction over Res.
- 2530. General Scope and Application of Doctrine.
- 2531. Application of Doctrine in Receivership Proceedings.
- 2532. Conflict of Jurisdiction between State and Federal Courts.
- 2533. When Exclusive Jurisdiction Attaches.
- 2534. Same Question Further Considered.
- 2535. General Principle Stated.
- 2536. Invalid Receivership Insufficient to Confer Exclusive Jurisdiction.
- 2537. When Concurrent Suits Maintainable.
- 2538. Vindication of Jurisdiction of Federal Court—Injunction against Suit in State Court.

Receivership Business to Be Conducted According to Laws of State.

- § 2539. Amenability of Receiver to State Laws.
- 2540. Receivership to Be Conducted in Conformity with State Statutes.

Proceedings Incident to Appointment of Receiver.

- 2541. Filing of Bill as Necessary Prerequisite.
- 2542. No Ancillary Receiver without Ancillary Suit.
- 2543. Application to Judge before Formal Filing of Bill.
- 2544. Only Party Plaintiff May Apply for Receiver.
- 2545. No Receiver over Plaintiff's Estate in Possession.
- 2546. Bill by Insolvent Company Seeking Receivership over Own Affairs.
- 2547. Prayer for Receiver—Appointment on Motion of Court.
- 2548. Application on Petition or Motion.
- 2549. Notice of Application for Receiver.
- 2550. Notice to Persons Not Parties to Suit.
- 2551. Appointment on Ex Parte Application.
- 2552. Right of Defendant to Be Subsequently Heard.
- 2553. Hearing on Application for Receiver.
- 2554. Plaintiff's Showing.
- 2555. Defendant's Showing.
- 2556. Weight of Answer.
- 2557. Failure to File Replication.
- 2558. Irregularities as Affecting Validity of Receivership Proceedings.
- 2559. Appointment of Receiver Not Subject to Collateral Attack.
- 2560. Discretion of Court as Regards Terms and Conditions.
- 2561. Condition Assumed by Stipulation.
- 2562. Interlocutory Character of Order Appointing Receiver.
- 2563. Appeal from Order Appointing Receiver.

Scope of Receivership.

- 2564. Property Included in Receivership.
- 2565. Nature of Property That May Be Put in Hands of Receiver.
- 2566. Order Extending Scope of Receivership.

General Effect and Incidents of Appointing Receiver.

- 2567. Effect of Receivership on Corporate Existence and Corporate Liability.
- 2568. Election of Corporate Officers.
- 2569. Effect of Receivership on Pending Suits.
- 2570. When Pending Suit Abates.
- 2571. Making Receiver Party to Pending Suit.
- 2572. Receiver Concluded by Prior Steps in Litigation.
- 2573. Right of Receiver to Counterclaim or Set Off against Intervenor.

*Receivership in General.***§ 2505. Receiver Defined.**

A receiver is an officer of the court through whom the court, by virtue of its jurisdiction, equitable or statutory, takes possession of

any property that may be the subject of a suit, preserves it from waste or destruction, secures and collects the proceeds, and ultimately disposes of the same according to the rights of those entitled thereto, whether they are regular parties in the cause or whether they only come before the court upon petition, in seasonable time and in due course of proceeding, to assert and establish their claims.¹ In the English practice, when a person is appointed for the purpose of conducting or superintending a business, as well as for the purpose of receiving and holding property, he is denominated a manager or a receiver and manager.² But according to the usage in America, a person is called a receiver whether he is appointed for the purpose of holding property or for the further purpose of conducting an enterprise, such as is involved in the operation of a railroad.³

The appointment of a receiver constitutes one of the most effective, not to say drastic, remedies known to chancery proceedings. It is exclusively a conservative remedial process. In this respect it is unlike the remedy of injunction. Injunction is a head of equitable relief, as well as a remedial process, and an injunction may be made a feature of the final decree, but receivership proceedings necessarily terminate when the suit is at an end and when the property that is the subject matter of the suit has been rightly disposed of under the orders of the court.

§ 2506. Power of Court to Appoint Receiver.

The authority to appoint a receiver resides in all courts exercising equity powers and having jurisdiction of any property that needs to be preserved pending a litigation. As regards the federal courts, the authority is most commonly exercised by the circuit court, as a court of first instance, but in a proper case the appellate court may also exercise the power. However, the supreme court will not appoint a receiver, on appeal, during the pendency of a foreclosure suit in that court, except under unusual conditions.⁴

¹ See 23 Am. & Eng. Enc. of Law (2d ed.) p. 1000; Beverley *v.* Brooke (1847) 39 C. C. A. 609, 99 Fed. 489, 4 Gratt. 187, 208.

The suggestion that a receivership is an office and that the receiver is an officer of the court is not to be taken too literally. It has been observed that a receivership is more in the nature of a condition than an office. It is a means by which the court of equity protects property taken into its custody, and the office of a receiver (if it can properly be called an office) exists whenever and wherever the appointment is made.

² 3 Dan. Ch. Pr. 462.

³ The term commissioner has sometimes been used to indicate the person or officer who is appointed with the power of a receiver to take possession of property pending a litigation. See Gunn v. Ewan (C. C. A.; 1899) 93 Fed. 80, 35 C. C. A. 213.

⁴ Pacific Railroad Co. *v.* Missouri-Pacific Railroad (1877) 95 U. S. 1, 24 L. ed. 347.

§ 2507. Nature and Scope of Receivership Proceedings.

The nature and functions of the office of receiver have been so often and so fully described by the courts, in judicial opinions, that there is no propriety in attempting any new and original account of it here. The following cases and the quotations made from the opinions therein of the several courts will be ample for our purposes.

1. *Booth v. Clark* (1854) 17 How. 331, 15 L. ed. 167: Mr. Justice Wayne described some of the chief characteristics of the office of receiver in the following words, which have been judicially quoted many times: "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. . . . He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause."

2. *Davis v. Gray* (1872) 16 Wall. 217, 21 L. ed. 452: In the course of a brief and accurate disquisition on the nature of the office of receiver, Mr. Justice Swayne said: "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken into execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is *in custodia legis*. He has only such power and authority as are given him by the court and must not exceed the prescribed limits. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person, while in the discharge of his official duties."

3. *Beverly v. Brooke* (1847) 4 Gratt. 208: "The receiver appointed is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct, and having in his character of receiver no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties. It is of no consequence to him how, or when, or to whom, the court may dispose of the funds in his hands, provided the order or decree of the court furnishes to him a sufficient protection. The order of appointment is in the nature, not of an attachment, but a sequestration: it gives in itself no advantage to the party applying for it over other claimants; and operates prospectively upon rents and profits which may come to the hands of the receiver, as a lien in favor of those interested, according to their rights and priorities in or to the principal subject out of which those rents and profits issue. In the exercise of this summary jurisdiction, a court of equity reverses, in a great measure, its ordinary course of administering justice; beginning at the end, and levying upon the property a kind of equitable execution, by which it

makes a general instead of a specific appropriation of the issues and profits, and afterwards determining who is entitled to the benefit of its *quasi* process. But acting, as it often must of necessity, before the merits of the cause have been fully developed, and not unfrequently when the proper parties in interest are not all before the court, it proceeds with much caution and circumspection, in order to avoid disturbing unnecessarily or injuriously legal rights and equitable priorities."

§ 2508. General and Special Receivers.

A general receiver is appointed to take charge of all the property of the defendant within the jurisdiction. The special receiver is one who is appointed to take charge of the particular property in litigation, less than the whole estate of the debtor. A receiver in foreclosure proceedings is a special receiver where the mortgage does not cover all the debtor's property.⁵ A special receiver is sometimes appointed in a proceeding where there is also a general receiver. In a case where a general receiver had been appointed for a corporation, a special receiver was appointed to sue for and collect obligations which were due exclusively to the creditors and which were of such nature that they could not be enforced by the general receiver of the corporation.⁶

§ 2509. Temporary and Permanent Receivers.

Receivers are also either temporary or permanent. Temporary receivers are sometimes appointed, where large interests are involved, to act until permanent receivers are chosen and put in charge. The temporary receiver will usually be continued as permanent receiver unless good reason to the contrary appears.⁷

Instead of naming one as a temporary receiver, a procedure that requires subsequent affirmative action on the part of the court to constitute him permanent receiver, the device has sometimes been adopted of appointing the receiver as such without qualification in the first instance but reserving leave for any interested party to appear within a limited time and object to the appointment. If no objection is made within that time the appointment becomes final, of course, without further action on the part of the court. The practical effect of such a reservation is to make the appointment temporary in its nature.⁸

⁵ *Central Trust Co. v. Worcester Cycle Mfg. Co.* (1902) 114 Fed. 659. ⁷ *Bowling Green etc. Co. v. Virginia etc. Co.* (1904) 133 Fed. 186.

⁶ *Hale v. Hardon* (C. C. A.; 1899) 37 C. C. A. 240, 95 Fed. 770. See *Hale v. Allinson* (1903) 188 U. S. 61, 47 L. ed. 385. ⁸ *Farmers' Loan etc. Co. v. Cape Fear R. Co.* (1894) 62 Fed. 675, 676.

§ 2510. Judicial Discretion as to Appointment of Receiver.

The question whether a receiver shall be appointed or not in any particular case is a matter within the sound discretion of the court, and the action of a court of first instance in disposing of such an application will not be reversed on appeal except upon a showing of a manifest abuse of discretion.⁹ But while the appointment of a receiver is said to be a matter of judicial discretion, this discretion is not arbitrary or absolute. It is a matter of sound judicial discretion to be exercised for the purpose of protecting the rights of all the parties in respect to the property in controversy;¹⁰ and when called upon to make such an order, the court will take care not to interfere unduly with the rights of any person holding a prior legal interest in the property.¹¹

§ 2511. Consent of Parties Not Conclusive.

A receiver will not be appointed merely because all the parties in interest agree that such step should be taken. The court will consider for itself whether it has the proper jurisdiction, and in the exercise of its own discretion will determine whether the situation is such as to warrant the appointment of a receiver.¹²

§ 2512. Considerations Bearing on Exercise of Judicial Discretion.

Each case must be determined upon its own conditions and circumstances. In exercising the power of appointing a receiver, the courts should ever keep in mind that the receivership, like the injunction, is an extraordinary remedy, and that such a proceeding ought never to be instituted except in cases of necessity, and upon a clear and satisfactory showing that an emergency exists, such as makes the appointment of a receiver requisite in order to protect the interests of one or more of the parties to the controversy. The power of appointing receivers is one that should be sparingly exercised, and with great caution and circumspection.¹³

⁹ *Sage v. Railroad Co.* (1888) 125 U. S. 361, 376, 31 L. ed. 694, 698, 8 Sup. Ct. 891; *Briggs v. Neal* (C. C. A.; 1903) 120 Fed. 224, 56 C. C. A. 572; *Vose v. Reed* (1871) 1 Woods 647, Fed. Cas. No. 17,011.

¹⁰ *Moore v. Bank* (1901) 106 Fed. 574. ¹² *Hutchinson v. American Pal. Car. Co.* (1900) 104 Fed. 182, 185.

¹¹ *Wiswall v. Sampson* (1852) 14 How. 64, 14 L. ed. 327. ¹³ *Ford v. Taylor* (1905) 137 Fed. 149; *Pullan v. Railroad Co.* (1865) 4 Biss. 36, 47, Fed. Cas. No. 11,481; *Latham v. Chafee* (1881) 7 Fed. 626, and authorities there cited.

Illustrations of conditions justifying appointment of receiver: *Naumburg v. Hyatt* (1885) 24 Fed. 898; *Ulman v.*

A well-grounded apprehension of immediate loss is necessary to justify the court in appointing a receiver. A remote, doubtful, or past danger is not sufficient.¹⁴ The appointment of a receiver looks to conservation or protection in the future, not in the past.¹⁵ The fact that the subject-matter of the suit is of a perishable nature is a circumstance that will sometimes make the appointment of a receiver a proper step.¹⁶

§ 2513. Receivership Must Be Necessary.

A receiver will not be appointed where the plaintiff's interests can be adequately protected by legal proceedings in the same or in another court.¹⁷ Where the mere *lis pendens* is sufficient fully to protect the plaintiff as regards his rights in the property, a receivership will be denied.¹⁸ Nor will a receiver be appointed where the rights and equities alleged to be in danger can be adequately protected by the efforts of the party interested without recourse to any legal proceedings; and the circumstance that the course by which this may be accomplished is somewhat inconvenient will not justify the granting of an order for a receiver.¹⁹

§ 2514. No Receiver upon Mere Dispute as to Title of Property.

A receiver will not ordinarily be appointed merely as custodian of the naked legal possession of property, the title to which is in dispute, there being no possibility of anything being done by him to manage, improve, or preserve it. The absence of a necessity for a receivership in such case is a sufficient reason for denying the application. No good purpose could be subserved by the appointment of a receiver under such conditions.²⁰ The existence of a disputed

Clark (1896) 75 Fed. 868; Pacific North-

west etc. Co. v. Allen (C. C. A.; 1901)

109 Fed. 515, 48 C. C. A. 521; Universal

Sav. etc. Co. v. Stoneburner (C. C. A.;

1902) 51 C. C. A. 208, 113 Fed. 251;

Clark v. Brown (C. C. A.; 1902) 57 C.

C. A. 76, 119 Fed. 130.

Illustrations of conditions insufficient

to justify appointment of receiver:

Union Mut. Life Ins. Co. v. Union Mills

Plaster Co. (1889) 37 Fed. 286, 3 L.R.A.

90; Buckeye Engine Co. v. Donau Brew-

ing Co. (1891) 47 Fed. 6; Lancaster v.

Asheville St. R. Co. (1898) 90 Fed. 129;

Taylor v. Decatur etc. Co. (1901) 112

Fed. 499; Joseph Dry Goods Co. v.

Hecht (C. C. A.; 1903) 57 C. C. A. 64,

120 Fed. 760.

¹⁴ Beecher v. Bininger (1870) 7

Blatchf. 170, Fed. Cas. No. 1,222; Lan-

caster v. Asheville St. R. Co. (1898) 90

Sav. etc. Co.; Fed. 129, 133.

¹⁵ Kelley v. Boettcher (1898) 89 Fed.

126, 130.

¹⁶ Crane v. McCoy (1860) 1 Bond 422,

Fed. Cas. No. 3,354.

¹⁷ Wanneker v. Hitchcock (1889) 38

Fed. 333.

¹⁸ Jones v. Smith (1889) 40 Fed. 314.

¹⁹ Overton v. Memphis etc. R. Co.

(1882) 10 Fed. 866.

²⁰ St. Louis etc. R. Co. v. Deweese

(1885) 23 Fed. 519.

equitable right to property is not, generally speaking, a sufficient basis of title to justify the court, at the instance of the holder of such equity, in taking possession and control from the holder of the legal title and putting the same in the hands of a receiver.²¹

§ 2515. Insolvency of Defendant.

The insolvency of a defendant in possession of the property in controversy does not alone justify the appointment of a receiver. The plaintiff must also show a probable right in himself, and that the rents or the corpus are in danger of being lost or impaired.

Ryder v. Bateman (1898) 93 Fed. 28: Hammond, J. said: "The bearing of the fact of insolvency is often misunderstood on an application for a receiver, and often, erroneously, it is supposed to be controlling. An insolvent party has the same right as another to enjoy his own until a better title is displayed. If a plaintiff sets up a case where the defendant is under some sort of obligation to pay over the rents to some one else, and he be insolvent, that fact might be controlling, perhaps; but not if he claims as owner, and is in possession and enjoyment as owner, absolutely. Then, if his right of ownership be challenged, the plaintiff must show something more than the challenge, to be entitled to a receiver pending the litigation. He must show a probably better right of ownership, otherwise insolvency is quite immaterial. If the corpus be in danger, there might be a better claim against an insolvent in possession of disputed property."

§ 2516. Relative Inconvenience to Respective Parties.

In passing upon the propriety of making an order for the appointment of a receiver, the court will always take into consideration the relative damage that might be expected to follow to the respective parties from the granting or withholding of the order. If the case be such that greater injury would ensue to one of the parties from the appointment of a receiver than would accrue to the other from withholding it, the order may be denied. Under the other hand, if the granting of the receivership will protect the applicant without doing material damage to the other party, the order may properly be granted.²² A receiver will be appointed where the defendant is irresponsible, and it appears that if the plaintiff were to establish his right to the fund in controversy his suit might be rendered fruitless by the act of the defendant in absconding.²³

²¹ *Schenck v. Peay* (1868) 1 Woolw. 175; *Overton v. Memphis etc. Co.* (1882) 10 Fed. 866. ²² *Parkhurst v. Kinsman* (1848) 2 Blatchf. 78, Fed. Cas. No. 10,760. See *Lenox v. Notrebe* (1833) Hempst. 225, Fed. Cas. No. 8,246b.

²³ *Vose v. Reed* (1871) Fed. Cas. No. 17,011; *Tysen v. Wabash R. Co.* (1878) Fed. Cas. No. 14,315.

§ 2517. Equity of Plaintiff's Cause as Affecting Appointment of Receiver.

The appointment of a receiver will not be granted where it does not appear that the plaintiff will probably prevail in the suit.²⁴

Kelley v. Boettcher (1898) 89 Fed. 125: Thayer, Circuit Judge, stated some of the considerations that govern the court in regard to the granting of an application for a receiver thus: "A sound rule which ought to be observed on such preliminary hearings is that the court should determine whether it is probable that on the final hearing of the case the allegations of the bill will be made good by competent proof, and whether the character and situation of the property is such that it ought to be taken into judicial custody in the meantime, for the purpose of preserving the rights of all parties in interest. If, upon a careful consideration of the pleadings and other moving papers, there is a strong probability of ultimate recovery, and the character of the property is such that it may deteriorate in value before there can be a full and final investigation of the case, the right and duty of the court to appoint a receiver is clear. The converse of this proposition must also be true, that if a recovery on final hearing seems doubtful, or if it is probable that the property in controversy will not suffer any deterioration in value prior to that time, or if the defendants have been in the undisturbed possession of the property for a number of years under an apparently good title, and are solvent and abundantly able to respond for any injury that may be done to it, as well as for any profits that may be derived therefrom after the application for a receiver is preferred, then a receiver ought not to be appointed. Adequate reasons should exist and be shown in all cases to warrant a court in depriving parties of the possession of property to which they have a good record title, and of which they have had peaceful possession for a series of years. All of the presumptions of law are in their favor."

§ 2518. Laches in Prosecution of Suit.

Delay in bringing on the hearing of the motion for a receiver may be sufficient of itself to justify a refusal of the motion. The lapse of six years from the filing of the bill is more than enough for this purpose.²⁵

§ 2519. Reluctance of Courts to Appoint Managing Receiver.

The courts are extremely reluctant to appoint a receiver—or at least they have always pretended to be—when the taking of such step would make it necessary for the court to undertake the management and conduct of a business enterprise. “It is not the province of a court of equity,” so it has been said, “to take possession of the property and conduct the business of corporations or individuals, except

²⁴ *Moore v. Bank of British Columbia* (1901) 106 Fed. 574. ²⁵ *Hood v. First Nat. Bank* (1886) 29 Fed. 55.

where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding.”²⁶

§ 2520. Appointment of Managing Receiver for Public Corporation.

Undoubtedly receiverships were first instituted merely for the purpose of taking possession of the property that was the subject-matter of the suit and of preserving it from deterioration, or selling and disposing of it, so that in the end the property itself or its proceeds might be distributed as the rights of the litigating parties should appear; and the management of a business was not understood to be any proper incident of the proceedings. But the exigencies of modern business have brought the courts in great measure away from this idea; and as a consequence we find them assuming from time to time the responsibility of appointing a managing receiver. They were first brought to this necessity in cases of railroad receiverships. These corporations are of a public character, and the public interests require that they should be operated continuously without regard to the vicissitudes that may overtake any particular management. As a consequence the federal courts nowadays never hesitate to appoint a receiver in railroad foreclosure cases and in other suits requiring the appointment of a receiver; and when a receiver is thus appointed, the railroad is operated during the pendency of the suit by the court acting through its receiver. Still it is said that the appointment of a receiver to manage and conduct such an enterprise involves the exercise of a power that can be justified only in case of absolute necessity.²⁷

§ 2521. Appointment of Managing Receiver for Private Business.

A managing receiver of an ordinary business enterprise, not of a public character, whether it be owned by an individual or by a corporation, will be appointed in a rare case only. One deterrent consideration is the responsibility of the thing; and, where a corporation

²⁶ Overton v. Memphis & Little Rock creation to be exercised in appointing R. Co. (1882) 10 Fed. 866, 867. a receiver for a railroad, the court said:

²⁷ Milwaukee etc. R. Co. v. Soutter (1864) 2 Wall. 510, 17 L. ed. 900; Farmers' Loan etc. Co. v. Kansas City etc. R. Co. (1892) 53 Fed. 182, 184. “Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of quasi-public corporations operating a public highway, and 125 U. S. 361, 378, 31 L. ed. 694, 698, always with reference to the special circumstances of each case as it arises.”

In Sage v. Memphis etc. R. Co. (1888) 8 Sup. Ct. 887, in regard to the dis-

is involved, the reluctance of the courts to appoint a managing receiver is based upon the further idea that such a step involves a virtual displacement of the board of directors. It displaces, so it is said, the board of managers placed there by the stockholders, such managers occupying the relation of trustees for the stockholders, for the corporation, and for its creditors. However, in cases where it is necessary, a managing receiver of a business enterprise can undoubtedly be appointed.²⁸

Cake v. Moham (1896) 164 U. S. 311, 41 L. ed. 447: A receiver was authorized to manage and conduct a hotel "in substantially the same manner as it has heretofore been carried on." By a later order he was authorized to borrow money to pay rent and debts incurred or to be incurred on account of running expenses. In approving these measures, the supreme court observed: "In view of the fact that the closing of the hotel, even temporarily, would have soon become known to its patrons, and would probably have been attended by a serious loss to the good will of the business, we think the court did not exceed its authority in directing the receiver to keep it open during the pendency of the suit."

§ 2522. Jurisdiction of Court as Affecting Validity of Receivership Proceedings.

A bill upon which the appointment of a receiver is sought should show a cause of action within the jurisdiction of the court. It must appear not only that the court has essential jurisdiction of the cause as being one of federal cognizance, but also that the suit is one of which the court has general jurisdiction as a court of equity. If the bill shows a total want of jurisdiction, the order appointing the receiver would be void; and at any rate if it turns out that the court lacks jurisdiction, various perplexities may arise.²⁹ However, the validity of orders made in a receivership cause does not depend on the actual existence of lawful jurisdiction, where the same appears at the time such orders are made.³⁰

Electrical Supply Co. v. Put-in-Bay Waterworks etc. Co. (1898) 84 Fed. 740: Several months after a receiver had been put in possession and after certificates

²⁸ *Overton v. Memphis etc. R. Co.* hands of a trustee, and authorized him (1882) 10 Fed. 864, 3 McCrary 426; *Robinson v. Taylor* (1890) 42 Fed. 803, to take immediate possession, which he did. This act was treated as a virtual abdication of their function by the board of directors).

204 (receiver appointed to manage a corporate business enterprise where the board of directors had executed a trust deed by which they placed the entire assets and property of the concern in the

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Ryder v. Bateman

(1898) 93 Fed. 223.

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Baltimore Building etc. Assoc. v.

Alderson (C. C. A.; 1900) 39 C. C. A. 609, 99 Fed. 489.

issued by authority of the court had been sold, it was made to appear that the suit had been collusively brought. It thereupon became necessary for the court to dismiss the suit, but before doing so finally and absolutely the court proceeded to give relief to those, including the holders of the certificates, who had acted on the faith of the court's orders.

§ 2523. Same—Existence of Remedy at Law.

Though an order appointing a receiver is wholly void where the court lacks essential jurisdiction of the subject-matter and the same appears on the face of the proceedings, such is not the case where the defect is merely that the plaintiff has an adequate remedy at law and the cause in consequence is not properly one of equitable cognizance.³¹ The objection that the plaintiff has an adequate remedy at law should be taken at an early stage in the suit, otherwise it is waived. Thus a receiver may be appointed in a creditors' suit brought by an unsecured creditor who has not reduced his claim to judgment, where the defendant appears, and by its sworn answer confesses the debt and its insolvency, and joins in the prayer for the appointment of the receiver.³²

§ 2524. Receivership Dependent on Plaintiff's Title to Equitable Relief.

The appointment of a receiver is, in its nature, an auxiliary relief properly incident to other equitable relief. Hence before a receiver will be appointed, the bill must point out and call for some suitable independent equitable relief to which the plaintiff is entitled and to which the receivership may be considered as a proper auxiliary relief. If the bill shows no title to independent equitable relief, it cannot be maintained merely for the purpose of obtaining the receivership.³³ But where the court has jurisdiction of the person and of the subject-matter, the validity of the receivership proceedings is not affected by the fact that the bill is, at a later stage, found not to state a good cause of action. The appointment of a receiver in such case is erroneous only and not void; and hence the order cannot be collaterally attacked.³⁴

³¹ *Clark v. Brown* (C. C. A.; 1902) *Shipbuilding Co.* (1903) 123 Fed. 913, 57 C. C. A. 76, 119 Fed. 130.

³² 918: "If it were clear that this bill was

³² *Horn v. Pere Marquette R. Co.* (C. brought, as so many bills are, simply C. A.; 1907) 151 Fed. 633.

³³ *Hutchinson v. American Palace Car Co.* (1900) 104 Fed. 182, 185; *Beeker v. Hoke* (C. C. A.; 1897) 26 C. C. A. 282, 80 Fed. 973.

³⁴ 318: "I for the purpose of getting a receiver, I should not concern myself about it."

³⁴ *Olmstead v. Distilling etc. Co.* (1895) 73 Fed. 44; *Shinney v. North American etc. Co.* (1899) 97 Fed. 9.

Putnam, J., said in *Conklin v. U. S.*

§ 2525. Territorial Limit of Jurisdiction over Property.

Though a court of equity may, by means of an order *in personam*, compel a party subject to its control to execute a conveyance of property beyond the jurisdiction of the court, the principle is well established that a court of equity has no power directly to reach and control, through its receiver, property of a defendant located beyond the territorial jurisdiction of the court, as where the property is situated in another state.³⁵ An order appointing a receiver of realty has no extraterritorial operation and cannot affect the title to real property located beyond the jurisdiction of the court by which the order was made.³⁶

§ 2526. In What District Receiver May Be Appointed.

A receiver can be appointed in any district where jurisdiction can be obtained over the defendant, and if, in a case where jurisdiction exists, a corporation defendant sees fit, by appearing and answering, to waive its privilege not to be sued in a particular district, a receiver can be appointed in that district.³⁷

Central Trust Co. v. McGeorge (1894) 151 U. S. 131, 135, 14 Sup. Ct. 286, 38 L. ed. 99, 101: Where a corporation had waived the fact that it was sued in the wrong district by an appearance and consent to the appointment of a receiver, the objection was subsequently made by stockholders and creditors who came in and challenged the appointment so made. After deciding that neither the plaintiff nor the defendant was a resident of the district, the court ruled that the objection, though good if made in time by the defendant, had been waived. The court then added: "It is scarcely necessary to say that, as the defendant company had submitted itself to the jurisdiction of the court, such voluntary action could not be overruled at the instance of the stockholders and creditors, not parties to the suit as brought, but who were permitted to become such by an intervening petition."³⁸

§ 2527. Appointment of Receiver in State Where Corporation Organized.

Where a corporation is to be wound up, the proceedings to that end can be instituted in the state where the corporation was organized; and a general receivership may be instituted there, though the corporation in question has no property within the limits of the particular jurisdiction. The initial proceedings having been instituted at

³⁵ *Kittel v. Augusta etc. R. Co.* (1897) 78 Fed. 855.

³⁷ *Lewis v. American Naval Stores Co.* (1902) 119 Fed. 391.

³⁶ *Schindelholz v. Cullum* (C. C. A.; 1893) 55 Fed. 885, 5 C. C. A. 293.

³⁸ *Grank Trunk R. Co. v. Central Vermont R. Co.* (1898) 85 Fed. 87, *accord.*

the place of ~~domicile~~, and a general receiver having been there appointed, ancillary receiverships may be instituted in other jurisdictions where any property is found requiring to be administered in the main suit.³⁹

§ 2528. Appointment of Receiver as Affected by State Statutes.

The practice of the federal courts in regard to the appointment of receivers is governed exclusively by the rules and statutes governing the procedure of the federal court and by the principles of procedure developed by them from the English practice in regard to receivers. But notwithstanding this, the right of a federal court to appoint a receiver may sometimes be materially affected by state statutes. For instance, if a state statute creates a substantive right inconsistent with the right to have a receiver appointed, a federal court will not appoint a receiver, though upon the general principles governing its own practice a receiver would be appointed.⁴⁰

Conflict of Jurisdiction in Receivership Proceedings.

§ 2529. Exclusive Authority of Court First Acquiring Jurisdiction over Res.

In suits involving the appointment of receivers, a conflict sometimes arises between courts exercising concurrent jurisdiction, as where separate suits seeking the appointment of a receiver over the property of a particular individual or corporation are instituted at about the same time by different plaintiffs in both the state court and federal court or in two different federal courts. Upon the main and great principle involved in such cases there is no diversity of opinion among the courts. This principle is that the court first acquiring jurisdiction over the property in controversy, or over the *res* that constitutes the subject-matter of the suit, is entitled to retain that jurisdiction to the end of the litigation without interference from any other court whatever.⁴¹

³⁹ Hutchinson v. American Palace pending foreclosure, the federal court will not grant an order for the ap-

⁴⁰ Union Mut. etc. Co. v. Union Mills Plaster Co. (1889) 3 L.R.A. 90, 37 Fed. 201 (where a local statute takes away the profits are being wasted).
the right of a mortgagee to obtain pos-
session until after foreclosure and con-
firmation of the sale, and where the same
statute is held to secure to the mortga-
gor the right to the rents and profits

⁴¹ Smith v. M'Iver (1824) 9 Wheat. 532, 535, 6 L. ed. 152, 153; Hagan v. Lucas (1836) 10 Pet. 400, 2 L. ed. 470; Peck v. Jenness (1849) 7 How. 612, 625, 12 L. ed. 841, 846; Taylor v. Carryl

§ 2530. General Scope and Application of Doctrine.

This principle applies in every case where a court acquires jurisdiction over property or obtains possession of it, whether by attachment, replevin, or by other mesne or final process, or by sequestration, or appointment of a receiver, or by any other means. The doctrine extends to cases where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and to all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property.⁴³

§ 2531. Application of Doctrine in Receivership Proceedings.

As applied to receivership causes, the rule imports that one court will not appoint a receiver for property where a receiver has already been appointed for the same property by another court of competent jurisdiction, such prior receiver having already taken possession of the property; or if a receiver is in fact appointed over property already in the hands of a prior receiver, he will not be permitted in any manner to interfere with the rights or possession of the first.⁴⁴ Where a foreclosure suit resulting in the appointment of a receiver is brought by second lienholders and the first lienholders are not made parties,

(1867) 20 How. 533, 596, 15 L. ed. 1028, 961, 966; *Reinach v. Railroad Co.* (1878) 1032; *Freeman v. Howe* (1860) 24 How. 58 Fed. 33, 44; *Wadley v. Blount* (1895) 450, 457, 16 L. ed. 749, 751; *Riggs v.* 65 Fed. 667, 674; *Cohen v. Solomon Johnson County* (1867) 6 Wall 166, 196, (1895) 66 Fed. 411, 413, 414; *Hatch v.* 18 L. ed. 768, 776; *Covell v. Heyman* *Bancroft-Thompson Co.* (1895) 67 Fed. (1894) 111 U. S. 176, 28 L. ed. 390, 4 802, 807; *Foley v. Hartley* (1896) 72 Sup. Ct. 365; *Hedritter v. Oilcloth Co.* Fed. 570, 573; *State Trust Co. v. Nation* (1894) 112 U. S. 294, 300, 302, 28 L. ed. al Land etc. Co. (1893) 72 Fed. 575; 729, 731, 732; *Harkrader v. Wadley* *In re Hall & Stilson Co.* (1896) 73 Fed. (1898) 172 U. S. 148, 164, 43 L. ed. 527; *Gamble v. City of San Diego* (1897) 369, 404, 18 Sup. Ct. 119; *Byers v. Mc* 79 Fed. 487, 500; *Atlantic Trust Co. v. Auley* (1893) 149 U. S. 608, 37 L. ed. Woodbridge Canal etc. Co. (1897) 79 807; *Shields v. Coleman* (1895) 157 U. Fed. 501; *Zimmerman v. Se Relle* (1897) 8. 188, 39 L. ed. 600; *Farmers' Loan etc.* 25 C. C. A. 518, 80 Fed. 417, 420; *In re Co. v. Lake Street El. R. Co.* (1900) 177 Foley (1897) 80 Fed. 949; *Thorpe v. U. S. 51, 44 L. ed. 661; Bell v. Trust Co.* Sampson (1897) 84 Fed. 63, 66; *Rodgers (1858)* 1 Biss. 230, Fed. Cas. No. 1,230; *v. Pitt* (1899) 96 Fed. 670. ⁴³ *Merritt v. American Steel-Barge*

236, 291, Fed. Cas. No. 5,284; *Union Co.* (C. C. A.; 1897) 24 C. C. A. 530, 79 Trust Co. v. Rockford etc. R. Co. (1874) Fed. 231.

6 Biss. 197, Fed. Cas. No. 14,401; *Union* ⁴⁴ *Garner v. Southern Mut. etc. Assoc.* Mut. L. Ins. Co. v. University of Chicago (1897) 28 C. C. A. 381, 84 Fed. 3; *Central Trust Co. v. South Atlantic etc.* (1881) 6 Fed. 448, 447; *Owens v.* Railroad Co. (1884) 20 Fed. 10, Judd R. Co. (1893) 57 Fed. 3; *Bruce v. Man* v. Bankers' etc. Tel. Co. (1887) 31 Fed. chester etc. R. Co. (1884) 19 Fed. 345; 182; *Sharon v. Terry* (1888) 1 L.R.A. Hutchinson v. Green (1881) 6 Fed. 837; 579, 36 Fed. 387, 388; *Gates v. Bucki Young v. Montgomery etc. R. Co.* (1875) (C. C. A.; 1898) 4 C. C. A. 116, 53 Fed. 2 Woods 618.

the latter cannot, in an independent foreclosure suit, obtain the appointment of a receiver until the first court discharges its receiver and surrenders possession of the property. This rule applies whether the different suits are brought respectively in state and federal courts or both in federal courts.⁴⁴

The same principle prevents a person from getting possession of property, during the pendency of a receivership, by means of any independent proceeding, even though it is brought in the same court that is entertaining the receivership cause.⁴⁵ Neither that court nor any other court will undertake to displace the receiver in any independent suit. The proper mode of proceeding is to obtain leave of the court to file a petition in the main cause.

§ 2532. Conflict of Jurisdiction between State and Federal Courts.

The doctrine by which one court is precluded from interfering with another court in the control of property already in its possession is primarily based upon the idea that when one court acquires jurisdiction over a *res*, this necessarily excludes another court from exercising jurisdiction over the same property. The second court is incompetent to exert jurisdiction over property already in the custody and control of another court. When the question arises between a federal court and a state court, an additional idea is involved, namely, the idea of comity; and judging from expressions found in many of the cases, one might suppose that as between the state and federal courts comity alone operates to prevent one of these courts from interfering with the administration of property in the hands of the other. But even in this case something more is involved than a mere principle of comity. As the supreme court of the United States has well said, the courts of

⁴⁴ *Young v. Montgomery etc. R. Co.* mortgage bondholders cannot be allowed to interfere with the suit of *1875*) 2 Woods 606, Fed. Cas. No. 18,166. In a suit brought by the holder the second mortgage bondholders. They of first mortgage bonds it appeared that can only interfere by being admitted as a suit was already pending in another parties in that suit. When the suit of federal court brought by the holder of the second mortgage bondholders has second mortgage bonds and that a receiver appointed by that court had taken possession of the property. This was held sufficient to preclude the appointment of a receiver in the second court. The court set forth the mutual relation and bearing of the two suits thus: "As the latter [i. e., the holders in the possession of the court through of the second mortgage bonds] have its receiver, can any other court or commenced their suits first, and have first obtained possession of the mortgaged property, the suit of the first

⁴⁵ *American Loan etc. Co. v. Central Vermont R. Co.* (1898) 86 Fed. 390.

the several states and the courts of the United States do not belong to the same system so far as their jurisdiction is concurrent; and though they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not on the same plane: and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty.⁴⁶

§ 2533. When Exclusive Jurisdiction Attaches.

As regards the application of the general principle, the courts are not in harmony, and much confusion is found in the decided cases. The point of difficulty is in determining just when one court first acquires jurisdiction over the property in controversy, so as thereby to exclude the jurisdiction of another court of concurrent jurisdiction and to prevent it from subsequently taking possession of the same property. No trouble arises where the court first exercising jurisdiction has, through its receiver or otherwise, obtained actual physical possession of the property in dispute. Here the rule obviously applies; and the authorities on this point are unanimous.⁴⁷ The main controversy has been on the question whether the mere filing of the bill coupled with due service of process on the defendant is sufficient, or whether, on the other hand, it is not necessary that actual possession should be taken. There are a number of cases in which it has been held that the question of jurisdiction is to be determined by the service of process, and not by the date of the actual taking of possession. Under this rule, if a bill is filed for the appointment of a receiver and process is actually served, the court in which such suit is filed thereby acquires such jurisdiction as will prevent another court from interfering with the property; and it is not necessary that the receiver should actually possess himself of the property.⁴⁸ On the

⁴⁶ *Covell v. Heyman* (1884) 111 U. S. Naval Stores Co. (1902) 119 Fed. 399; *Owens v. Ohio Central R. Co.* (1884) 20

⁴⁷ *Heidritter v. Elizabeth Oilcloth Co.* Fed. 10; *Bell v. Ohio L. & T. Co.* (1858) (1884) 112 U. S. 294, 305, 28 L. ed. 729, 1 Biss. 280; U. S. *r. Eisenbeis* (C. C. 733; *Buck v. Colbath* (1865) 3 Wall. 334, A.; 1901) 50 C. C. A. 179, 112 Fed. 197; 18 L. ed. 257; *Baltimore etc. R. Co. v. Illinois Steel Co. v. Putnam* (C. C. A.; *Wabash R. Co.* (C. C. A.; 1902) 57 C. 1895) 15 C. C. A. 558, 68 Fed. 515. C. A. 322, 119 Fed. 678.

⁴⁸ As between the immediate parties the jurisdiction determined by date of exclusive jurisdiction of the first court service: *Wilmer v. Atlanta etc. R. Co.* may attach from the filing of a bill. (1874) 2 Woods 410; *Adams v. Trust Farmers' Loan & Trust Co. v. Lake Co.* (C. C. A.; 1895) 15 C. C. A. 1, Street etc. R. Co. (1900) 177 U. S. 51, 66 Fed. 617, 620; *Lewis v. American* 60, 44 L. ed. 667, 671, 20 Sup. Ct. 564,

other hand, it has sometimes been held that the exclusive jurisdiction of the first court does not attach until it (or its receiver) has taken actual possession of the property. In this view possession is considered the essential and main constituent of jurisdiction.⁴⁹

§ 2534. Same Question Further Considered.

It should be borne in mind in this connection that the determining factor is, which court has first obtained jurisdiction over the property—and we are here concerned only with suits involving the exercise of jurisdiction over property. The test is not to be found in the matter of jurisdiction over the parties or over the controversy. The court acquires jurisdiction over the controversy, in a certain sense, upon the filing of the bill; and it acquires jurisdiction over the party defendant upon the service of process. But this does not always confer jurisdiction over the property that is the subject-matter of the suit. Upon principle it appears that those decisions in which the courts have insisted upon the taking possession of the property as the true test are more nearly correct than are those in which the courts have insisted that the mere service of process is enough to exclude the jurisdiction of another court. Undoubtedly, however, there are situations in which the mere filing of the bill and the subsequent service of process does confer a jurisdiction over the property. There are cases in which the assumption of jurisdiction over the property is necessarily involved in the fact that the court assumes to entertain the suit at all. The idea has been expressed thus: "Where . . . the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may properly be held to be *in gremio legis*. The actual seizure of the property is not necessary to produce this effect where the possession of the property is necessary to the granting of the relief sought."⁵⁰

⁴⁹ *In re Hall & Stilson Co.* (1896) 73 Fed. 527, 529, 530; *Knott v. Evening Post Co.* (1903) 124 Fed. 342; *East Tennessee etc. R. Co. v. Atlanta etc. R. Co.* (1892) 15 L.R.A. 100, 49 Fed. 608; *Wilmer v. Atlanta etc. R. Co.* (1875) 2 Woods 410 (per Bradley, Circuit Justice).

⁵⁰ *Illinois Steel Co. v. Putnam* (C. C. A.; 1895) 15 C. C. A. 556, 68 Fed. 516, citing *Adams v. Trust Co.* (C. C. A.; 1895) 15 C. C. A. 1, 68 Fed. 617.

"Where the subject-matter of the suit in equity is real estate, which is taken into the possession of the court pending the litigation, by the appointment of a receiver, or by sequestration, the title is bound from the filing of the bill; and any purchaser *pendente lite*, even if for a valuable consideration, comes in at his peril." *Wiswall v. Sampson* (1852) 14 How. 52, 65, 14 L. ed. 322, 328. See *Hitz v. Jenks* (1902) 185 U. S. 166, 48 L. ed. 865.

§ 2535. General Principle Stated.

Though it is not possible to deduce a principle upon which all the cases can be reconciled, it may be said generally that in order for the jurisdiction of one court over property to be exclusive, it is necessary that there should be (1) either an actual taking possession of the property, or (2) the suit must be of such character as necessarily to involve the assumption of jurisdiction over the property, or (3) the court must do some act sufficient to bring the property under its control.⁵¹ It has been held that where a bill is filed to foreclose a mortgage, and the appointment of a receiver is asked for as an incident to the foreclosure, and the court at the inception of the suit grants a restraining order to prevent a transfer of the property until the court may act on the motion for a receiver, the granting of such injunction involves an assumption of jurisdiction over the property such as will give the court granting such order exclusive jurisdiction.⁵²

§ 2536. Invalid Receivership Insufficient to Confer Exclusive Jurisdiction.

Where the judge of a state court appoints a receiver during vacation, but without statutory authority to do so, such appointment is ineffectual; and the taking of possession by such receiver is no obstacle to the appointment of a receiver for the same property in a suit brought in the federal court.⁵³

§ 2537. When Concurrent Suits Maintainable.

The fact that a receiver has been appointed by a federal court and that possession has been taken by him of property within the jurisdiction of the court of appointment does not prevent a state court from entertaining a suit and appointing a receiver in a cause of action against the same defendant, provided such receiver does not interfere with the property of which the receiver appointed by the federal court has already obtained possession.⁵⁴ Upon a similar principle the fact

⁵¹ See, generally, 23 Am. and Eng. Encyc. of Law (2d ed.) p. 1112; 1 Co. (1881) 105 U. S. 77, 26 L. ed. 1111. Pomeroy's Equitable Remedies, § 170; Adams v. Mercantile Trust Co. (C. C. A.; 1895) 15 C. C. A. 1, and note pp. 6-13, 66 Fed. 617; Louisville Trust Co. v. City of Cincinnati (C. C. A.; 1896) 22 C. C. A. 334, and note, pp. 358-376, 76 Fed. 296.

⁵² Appleton Waterworks Co. v. Central Trust Co. (C. C. A.; 1899) 35 C. C. A. 302, 93 Fed. 286.

⁵³ Hammock v. Farmers' Loan & Trust Co. (1881) 105 U. S. 77, 26 L. ed. 1111. Leadville Coal Co. v. McCreery (C. C. A.; 1891) 141 U. S. 475, 38 L. ed. 824, 12 Sup. Ct. 28. In its decree appointing a receiver, the state court made the following reservation: "But inasmuch as it appears that the estate and effects of said [defendant] are at the present time in the hands of a receiver appointed by and acting under the orders of the circuit court of the United States for the

that a receiver has been appointed by a state court and that possession has been taken by him of the property of the defendant does not prevent a federal court from entertaining a suit in respect to the same property against the same defendant and giving such relief as it may give without interfering with the state court. Thus where a state court has appointed a receiver under a foreclosure suit brought by a second mortgagee and thereby obtained possession of the property, the federal court will not appoint a receiver in a suit brought by the first mortgage, but it will entertain the suit and give such relief as it may without interfering with the state court.

Metropolitan Trust Co. v. Lake Cities etc. Co. (1900) 100 Fed. 897, 899: In a case where the situation just indicated was presented it was said: "This court concedes that it can decree no relief in the present suit which will in any wise disturb the possession of the property in the custody of the state court. It cannot appoint a receiver for that property, nor can it cause the same to be sold by its master. To do these things would tend to disturb the possession of the state court, and might lead to unseemly conflict. But because the court cannot grant all the relief prayed for does not justify it in refusing to grant such relief within its jurisdiction as the nature of the case requires for the protection of the rights of the complainant. The entry of a decree of foreclosure against the railway company, and an order for the sale of its plant and property, will not, of themselves, disturb the possession of the state court."⁵⁵

It was further held in this case that the federal court had jurisdiction to determine the relative rank of the certificates issued by the receiver of the state court and the lien of the plaintiff in the federal court, the reason being that the state court had had no jurisdiction or power to create a lien superior to that of this plaintiff, he not having been a party to the suit in the state court.

§ 2538. Vindication of Jurisdiction of Federal Court—Injunction against Suit in State Court.

The federal court, having once acquired jurisdiction over property through the appointment of a receiver, will proceed to final determination of the rights of the parties and to the execution of its decree without regard to subsequent proceedings in a state court.⁵⁶ And the federal court, having acquired prior jurisdiction over the subject-matter, will enjoin at any time a suit in a state court subsequently

Northern District of Ohio, it is ordered gomery etc. R. Co. (1875) 2 Woods 606, that the receiver hereby appointed shall Fed. Cas. No. 18,108; *Griswold v. Cen-* not interfere with the possession of the trial Vermont R. Co. (1881) 9 Fed. 797, receiver appointed by said federal court 20 Blatch. 212. of the effects and assets of said corpora- ⁵⁶ *In re Hall & Stilson Co. (1896)* 73 Fed. 527; *Holland Trust Co. v. In-* tiation."

⁵⁵ See *Mercantile Trust Co. v. La-* *ternational etc. Co. (C. C. A.; 1898)* moille Val. R. Co. (1879) 16 Blatch. 324, 85 Fed. 865, *affirming* (1897) 81 Fed. Fed. Cas. No. 9,432; *Young v. Mont-* 422, 26 C. C. A. 469,

brought, where such injunction is necessary to protect the jurisdiction of the federal court. Thus a suit in a state court brought against a federal receiver may be enjoined by the court appointing the receiver where such court has exclusive jurisdiction and the suit in question would interfere with the control of the court over the receivership property. The statute declaring that the writ of injunction shall not be granted by a federal court against proceedings in a state court does not apply where the object of the injunction is to protect the exclusive jurisdiction of the federal court previously acquired.⁵⁷

Receivership Business to Be Conducted According to Laws of State.

§ 2539. Amenable of Receiver to State Laws.

We have seen that by the mere fact that property has been placed in the hands of a receiver appointed by a federal court all other courts are deprived of the power to exercise jurisdiction over the property; and the receiver himself, being a mere arm of the court, is peculiarly under its protection and jurisdiction, so that he is not subject to be controlled or held liable by any other court. One of the necessary consequences of this principle is that a federal receiver or manager in possession of a railroad is not amenable to the courts of the state in which the railroad operated by him is situated; and he cannot be compelled to obey the laws of such state except in so far as he is directed to obey them by the court that appointed him. This rule has been considered to be capable of abuse, and it has therefore been abolished by an act of Congress:

Act of August 13, 1888 ch. 866, sec. 2: Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

⁵⁷ Jesup v. Railroad Co. (1890) 44 R. Co. (1901) 110 Fed. 10; Stewart v. Fed. 683; Central Trust Co. v. St. Louis Wisconsin etc. R. Co. (1902) 117 Fed. etc. R. Co. (1893) 59 Fed. 385; Terre Haute etc. R. Co. v. Peoria etc. R. Co. (1897) 82 Fed. 943; Fidelity Ins. etc. Co. v. Bank (1895) 67 Fed. 833, 16 C. C. A. 815; State Trust Co. v. Kansas City etc. Eq. Prac. Vol. II.—93.

§ 2540. Receivership to Be Conducted in Conformity with State Statutes.

Under this law it becomes the duty of a receiver appointed by a federal court, to operate his road and to manage other property committed to his care according to the statutes of the state in which the property is situated or business conducted;⁵⁸ and whenever a court appointing a receiver is made to know, in any proper way, that its receiver is violating the law of the state, the court will of its own motion direct him to cease further violation.⁵⁹ But the requirement of the statute that the receiver shall operate his property in accordance with the laws of the state is not to be construed as requiring the court to administer the property in its hands agreeably to the laws of a state.⁶⁰

Proceedings Incident to Appointment of Receiver.

§ 2541. Filing of Bill as Necessary Prerequisite.

From the fact that a receivership is a dependent proceeding and maintainable only during the main litigation, it follows that the appointment of a receiver can never properly be made until a suit in equity is duly and properly begun; for until a bill is filed, there is nothing to support the jurisdiction for the appointment of a receiver.⁶¹ An order granted before the filing of a bill, appointing a receiver and authorizing him forthwith to take possession of property, is doubtless totally void,⁶² unless possibly where the property in question belongs to an infant or lunatic and the application is made on his behalf;⁶³ and certainly the appointment of a receiver in any ordinary case, upon a mere *ex parte* application before the filing of a bill, will be vacated on motion as having been irregularly made.⁶⁴

⁵⁸ *Erb v. Morasch* (1900) 177 U. S. 584, 44 L. ed. 897; *Houston First Nat. Bank v. Ewing* (C. C. A.; 1900) 103 Fed. 195, 43 C. C. A. 150.

⁵⁹ *Felton v. Ackerman* (C. C. A.; 1894) 61 Fed. 228, 9 C. C. A. 457.

⁶⁰ *First Nat. Bank v. Ewing* (C. C. A.; 1900) 103 Fed. 188, 195, 43 C. C. A. 150.

⁶¹ No application for the appointment of a receiver will be entertained except after a bill has been filed and a subpoena issued thereon. No. 30 of Rules of Circuit Court for the Northern District of California.

Apparently the only exception recognized in the English chancery to the rule that a receiver cannot be appointed unless a suit is pending was in the case of the estate of idiots and lunatics (3 Dan. Ch. Pr. 426); though the exception has also been stated to extend to cases involving the interests of infants. *In re Brant* (1899) 96 Fed. 257.

⁶² *Merchants etc. Bank v. Kent* (1880) 43 Mich. 292, 5 N. W. 627.

⁶³ *In re Brant* (1899) 96 Fed. 257.

⁶⁴ *Greene v. Star Cash etc. Co.* (1900) 99 Fed. 656.

§ 2542. No Ancillary Receiver without Ancillary Suit.

The rule requiring the filing of a bill as an essential prerequisite to the exercise of the jurisdiction of appointing a receiver is commonly held to be applicable where the appointment of an ancillary receiver is sought. Such a receiver will not be appointed in a court of ancillary jurisdiction until a bill has been filed in such court.⁶⁵

§ 2543. Application to Judge before Formal Filing of Bill.

While it is true the appointment of a receiver presupposes the actual pendency of the suit in which the receiver is appointed, yet if the bill is framed and submitted to a judge at chambers at the same time that the application is made for the appointment of a receiver, this submission of the bill to the judge is, no doubt, such a commencement of the suit as will support the appointment of the receiver, there being no specific rule of the court to the contrary. For instance, if a bill asking for the appointment of a receiver is submitted to a judge and he grants the application for a temporary receiver, his order becomes effective though the bill is not actually lodged with the clerk nor the subpoena served till two days thereafter. In such case the real filing of the bill occurs when it is submitted to the court.⁶⁶

All question on this point is removed where the court takes the bill at chambers, writes out the order of appointment, and makes it provisional upon the actual filing of the bill. The order then takes effect from the moment, and only from the moment, when the bill and order are lodged or filed with the clerk. The order takes effect upon the filing of it, without regard to any delay incident to its being transcribed into the order book by the clerk.⁶⁷

§ 2544. Only Party Plaintiff May Apply for Receiver.

The application for the appointment of a receiver must be made by a party entitled to affirmative relief. This means that the applicant must be in the position of plaintiff or cross-plaintiff.⁶⁸ Where a bill is filed for a receiver but the plaintiff afterwards declines to move

⁶⁵ *In re Brant* (1899) 96 Fed. 257; (C. C. A.; 1902) 113 Fed. 251, 51 C. C. Greene v. Star Cash etc. Co. (1900) 99 A. 208. Fed. 656. *Contra*, *Platt v. Philadelphia* ⁶⁷ *Horn v. Pere Marquette R. Co.* (C. etc. R. Co. (1893) 54 Fed. 569, as to the C. A.; 1907); 151 Fed. 635. appointment of ancillary receivers in ⁶⁸ *Henshaw v. Wells* (1848) 9 Humph. the first circuit. ^{568, 584; Leddel v. Starr} (1868) 19 N. ^{568,} 159;

⁶⁶ *Universal etc. Co. v. Stoneburner* J. Eq. 159,

for the appointment, a receiver will not be appointed on the application of the defendant.⁶⁹

§ 2545. No Receiver over Plaintiff's Estate in Possession.

The appointment of a receiver is a remedy incidental to the granting of equitable relief, and it is not a final remedy such as to constitute in itself a species of distinct relief. It follows that a bill seeking the appointment of a receiver must first show a title to distinct equitable relief and also such a state of affairs as will justify the appointment of a receiver as an incident to the obtaining of the final relief. One important and necessary consequence of this principle is that a bill for a receiver cannot be brought by the person over whose property the receivership is to be established, for no person can be entitled to substantive relief against himself, and where there is no title to substantive relief the right to the incidental relief cannot exist. It has accordingly been held that when a corporation becomes insolvent it cannot maintain a bill in equity for the appointment of a receiver to wind up its own affairs. A receiver may be appointed in a proper case at the instance of a creditor or other person showing a good right to a receivership but not at the instance of the insolvent debtor himself.⁷⁰ The same rule would of course apply in the case of a private person. No one can have a receiver appointed over his own property where it is already in his possession and control.

§ 2546. Bill by Insolvent Company Seeking Receivership over Own Affairs.

The rule stated in the preceding paragraph, though unquestionably sound, has sometimes been violated in the federal courts. Thus upon one or two occasions a bill has been maintained by an insolvent corporation, alleging its insolvency and seeking the appointment of a receiver for the benefit of all concerned.⁷¹ This practice is undoubt-

⁶⁹ *Robinson v. Hadley* (1849) 11 Beav. 614. may be obtained as a simple way out of financial difficulties, even where the road is not actually insolvent.

⁷⁰ *Hugh v. McRea* (1869) Chase Dec. 468; *Kimball v. Goodburn* (1875) 32 Mich. 10; *Hinchley v. Pfister* (1892) 83 Wis. 64, 53 N. W. 21.

⁷¹ *Wabash, St. L. etc. R. Co. v. Central Trust Co.* (1884) 22 Fed. 272 (and the same court, after having appointed

the receiver on the *ex parte* application of the corporation, subsequently refused to transfer the receivership to a cross action brought by the mortgage creditors. *Central Trust Co. v. Wabash, St. L. etc. R. Co.* (1885) 23 Fed. 863).

edly an abuse of equitable jurisdiction, but the error is not of such character as to render the proceedings void or defeat rights acquired under the receivership proceedings. Any objection to such defect of jurisdiction should be made in the early stages of the suit; and it is not available on appeal, no objection having been made in the lower court.⁷³

§ 2547. Prayer for Receiver—Appointment on Motion of Court.

If the exigency justifying the appointment of a receiver is apparent or can be foreseen at the time when the bill is prepared, a special prayer asking for an order for the appointment of a receiver should be inserted in the bill.⁷³ But it is not essential to the appointment of a receiver that the bill should contain a prayer for such relief.⁷⁴ Not infrequently the occasion for the receivership arises after the bill is filed. Furthermore it is not essential that either party should move the court to appoint a receiver. The court will proceed of its own motion to appoint a receiver whenever it is manifest that the exigency of the situation requires that this should be done.

Elk Fork Oil & Gas Co. v. Foster (C. C. A.; 1900) 99 Fed. 495, 39 C. C. A. 615: The existence of conflicting interests in oil and gas rights resulted in the filing of two independent suits between the same parties. Each party obtained an injunction against the other. Neither bill prayed for a receiver, and neither party sought such relief. The suits were heard together as on bill and cross bill. Some difficult questions were presented that could not properly be determined in the early stages of the suit, and it was impossible to say which side was in the right. There was danger of irreparable mischief to the interests of the party that might finally prevail. The court therefore, on its own motion, appointed a receiver to take possession and manage the property *pendente lite*. This course was approved in the circuit court of appeals.

§ 2548. Application on Petition or Motion.

A receiver may be appointed though the bill does not contain a statement of facts sufficient to justify the appointment of the receiver. If a proper case for equitable relief is made out and a case for the appointment of a receiver exists, the application for the appointment

⁷³ *Quinney etc. R. Co. v. Humphreys* plaintiff, in his bill, to ask for any (1892) 145 U. S. 82, 104, 36 L. ed. 632, special order that may be needed pend-

639 (dealing with a branch of the Wa- ing the suit).

hash case); *International Trust Co. v. T. B. Townsend Brick etc. Co.* (C. C. (1878) 5 Sawy. 172, Fed. Cas. No.

A; 1899) 95 Fed. 855, 37 C. C. A. 396, 3,057.

⁷⁴ *Equity Rule 21* (requiring the

of the receiver may be made by petition or motion, supported by an affidavit of the essential facts.⁷⁵

The application for the appointment of a receiver is regularly made by petition or motion addressed to the court or a judge of the court in which the cause is pending. An order for the appointment of a receiver can be made by a judge at chambers as well as in open court.⁷⁶

§ 2549. Notice of Application for Receiver.

Notice of the application or motion for the appointment of a receiver should always be given to the person who is to be dispossessed of his property or assets, whenever the giving of such notice is practicable. However, previous notice of the motion for a receiver is not necessary when counsel for the opposite party is present in court,⁷⁷ nor is notice necessary where the court assumes the responsibility of appointing a receiver on its own motion. The court does not have to give notice of its own "motion."⁷⁸

§ 2550. Notice to Persons Not Parties to Suit.

Where the property to be put in the hands of a receiver is extensive and many persons are interested, it is not improper for the court to require the giving of notice to all concerned, so far as practicable, though they be not actual parties to the suit. For instance, upon an interlocutory application for a receivership of a corporation engaged in a manufacturing enterprise, the court ordered that notice of the application for the receivership should be given to the corporation, it being the only respondent named in the prayer for subpoena, also that public notice of the pendency of the application should be given by publication in newspapers circulating in the localities where the creditors and principal stockholders live.⁷⁹

§ 2551. Appointment on Ex Parte Application.

A court of equity has the power to grant an order for the appointment of a receiver upon an *ex parte* application without notice. But

⁷⁵ Commercial etc. Bank *v.* Corbett of the court. Hammock *v.* Loan & Trust (1878) 5 Sawy. 172, Fed. Cas. No. 3,057. Co. (1881) 105 U. S. 77, 26 L. ed. 1111.

⁷⁶ Vose *v.* Reed (1871) 1 Woods, 647, Fed. Cas. No. 17,011; Horn *v.* Pere Marquette R. Co. (1907) 151 Fed. 635, 637. ⁷⁷ McLean *v.* Lafayette Bank (1844) 3 McLean 503, Fed. Cas. No. 8,887.

⁷⁸ Elk Fork etc. Co. *v.* Foster (C. C. A.; 1900) 99 Fed. 495, 39 C. C. A. 615. In Illinois, a judge of the state circuit court cannot appoint a receiver of a railroad in vacation; and if a receiver is so appointed, his possession is not that ⁷⁹ Hutchinson *v.* American Palace Car Co. (1900) 104 Fed. 182, 184.

this will be done only in a strong case of pressing emergency or of "imperious necessity," where the circumstances are such as to require immediate action before there is time to give notice; or it must be shown that notice would jeopardize the delivery of the property over which the receivership is to be extended.⁸⁰ It is reversible error for a court to appoint a receiver without notice in cases not of this exceptional kind.⁸¹ Such action can be justified only when the rights of the plaintiff and the relief to which he shows himself entitled can be secured and protected in no other way.⁸² The need for the exercise of the power to appoint a receiver upon an *ex parte* application without notice is greatly lessened in federal courts of equity by reason of the fact that they have power to grant preliminary restraining orders, which will usually preserve the *status quo*. And this mode of proceeding should always be resorted to where it would appear to be sufficient, leaving the question of receivership *vel non* to be considered after due notice.⁸³

Error in appointing a temporary receiver without notice is waived if the party concerned makes no objection thereto when the permanent receiver is appointed.⁸⁴

§ 2552. Right of Defendant to Be Subsequently Heard.

If the motion for the appointment of a receiver is made without notice and a sufficient showing is made to justify the appointment upon such *ex parte* application, the common practice is to grant an order for the appointment of a merely temporary receiver. At the same time a rule is entered requiring the defendant to appear and show cause why the application should not be granted and the receivership made permanent.⁸⁵ But whether this particular course is followed or not, the defendant against whom an order has been made for the appointment of a receiver, without notice, must be allowed to come in within a reasonable time and move to have the

⁸⁰ *Bank of Florence v. United States* ⁸² *Huff v. Bidwell* (C. C. A.; 1907) Sav. etc. Co. (1893) 104 Ala. 297, 16 So. 151 Fed. 563, 81 C. C. A. 43. 110. ⁸³ *North American etc. Co. v. Wat-*

⁸¹ *North American Land etc. Co. v. kina* (C. C. A.; 1901) 109 Fed. 101, 106, Watkins (C. C. A.; 1901) 109 Fed. 101, 48 C. C. A. 254. ⁸⁴ *Huff v. Bidwell* (C. C. A.; 1907) 48 C. C. A. 254; *Cabaniss v. Reco Min. Co.* (C. C. A.; 1902) 116 Fed. 318, 54 151 Fed. 563, 81 C. C. A. 43. In this C. C. A. 190; *Joseph Dry Goods Co. v. Hecht* (C. C. A.; 1903) 120 Fed. 760, 57 C. C. A. 64.

Receiver appointed upon *ex parte* application in suit to foreclose chattel mortgage. *H. B. Clafin Co. v. Furtick* (1902) 119 Fed. 429. ⁸⁵ *Ford v. Taylor* (1905) 137 Fed. 149.

order rescinded; and if the court appointing the receiver unduly postpones the right of such party to appear and contest the proceedings, the proceeding is irregular and will be vacated on appeal.⁸⁶

§ 2553. Hearing on Application for Receiver.

The hearing of an application for the appointment of a receiver, whether upon *ex parte* application or upon notice and appearance of the adverse party, is a purely interlocutory hearing; and the case cannot then be determined upon its merits as at a final hearing.⁸⁷

§ 2554. Plaintiff's Showing.

In order to sustain his application, the plaintiff is entitled to use his verified bill or petition and any affidavit or affidavits that he may choose to file. The statements of fact upon which the application is based must be specific. Mere general allegations to the effect that the appointment of a receiver is necessary to prevent irreparable injury are not sufficient. Where a receiver is sought for a corporation on the ground of fraud and mismanagement on the part of the corporate officers, the bill must clearly show in what the frauds consist. The mere belief of the plaintiff that rascality has been committed, coupled with general averments of negligence and bad management, will not suffice.⁸⁸

The appointment of a receiver may be justified by the admissions of the answer on points not fully covered and made clear by the allegations of the bill.⁸⁹

§ 2555. Defendant's Showing.

A defendant who resists an application for the appointment of a receiver is entitled to use his verified answer (where his answer is ready to be filed), together with such affidavits as he may see fit to introduce for the purpose of meeting the case made in the plaintiff's bill, or petition, and affidavits, or for the purpose of supporting any affirmative defense stated in the defendant's own answer. The defendant is entitled to swear to his answer and use the same as an affidavit on the motion for the appointment of a receiver, though the answer under oath is waived in the bill.⁹⁰

⁸⁶ Williamson *v.* Wilson (1826) 1 Bland Ch. 424. ⁸⁸ Union Mut. Life Ins. Co. *v.* Kellogg (1878) Fed. Cas. No. 14,373.

⁸⁷ Karp *v.* Michigan Lake Shore R. Co. (1873) Fed. Cas. No. 7,727. ⁹⁰ Ryder *v.* Bateman (1898) 93 Fed. 16.

⁸⁸ Clark *v.* National Linseed Oil Co. (C. C. A.; 1901) 105 Fed. 787, 45 C. A. 53.

§ 2556. Weight of Answer.

Where the answer under oath is waived in the bill but the answer is nevertheless sworn to and used as an affidavit in resisting the application for the appointment of a receiver, it is to be given the same effect and weight as would formerly have been attributed to it before the rule was adopted allowing the plaintiff to waive the answer under oath; for the rule in which that privilege is given expressly declares that notwithstanding the waiver of the oath, the answer may nevertheless be used "as an affidavit, with the same effect as heretofore," on any incidental motion in the cause.⁹¹ Judicial expressions are found in some of the cases to the effect that if the answer under oath is not waived in the bill, the sworn answer has a greater weight in opposition to the application for the receiver than it has in a case where the oath is waived and the defendant swears to the answer for the purpose of using it as a mere affidavit.⁹² But this is a mistaken notion. The correct doctrine is that if the answer under oath is not waived, the sworn answer denying the facts upon which the application for a receiver is based is sufficient to meet the plaintiff's case, and the receiver will not be appointed. Likewise if the answer under oath is waived in the bill, but the plaintiff nevertheless swears to it for the purpose of using it as an affidavit in resistance to the application for a receiver, such answer will also be accepted as sufficient to meet the case stated in the plaintiff's bill, and the receiver will not be appointed. Such is the rule where the motion for the receiver is heard upon the allegations of the bill and answer, without any affidavits being put in by either party.⁹³ Indeed, it has been pointed out that in every sort of interlocutory proceeding in equity causes, where an application is made upon petition and answer merely, without proof, the same principle applies as where the cause is set for hearing and heard on bill and answer, that is, the party answering is entitled to the benefit of all responsive denials contained in the answer. Also, the new defensive matter set up in the answer is to be taken as true. The decision can be given in favor of the petitioner only where the answer contains sufficient admissions to make out the plaintiff's title to relief and sets up no affirmative facts in avoidance.⁹⁴

⁹¹ Equity Rule 41 (as amended December Term, 1871).

⁹² *Ryder v. Bateman* (1898) 93 Fed. 16; *Harrington v. Union Oil Co.* (1906) 144 Fed. 235.

⁹³ *U. S. v. Workingmen's etc. Council* (1893) 54 Fed. 994, 996, 26 L.R.A. 158; *Ford v. Taylor* (1905) 137 Fed. C. A.; 1906) 145 Fed. 820, 76 C. C. A. 149; *Clark v. National Linseed Co.* (C. A.; 1901) 105 Fed. 793, 45 C. C. A. 53

⁹⁴ *Atlantic Trust Co. v. Chapman* (C.

Of course if the respective parties put in affidavits in support of the bill or answer, and the application is heard upon these as well as upon the bill and answer, the result is to be determined by the weight of all the proof as thus adduced by the parties; and the rule that a receiver will not be appointed over the responsive answer of the defendant does not apply.⁹⁵

§ 2557. Failure to File Replication.

A receiver should not be appointed where the plaintiff fails to file a replication to the defendant's answer within the time allowed therefor; and where a receiver has already been appointed, the bill should be dismissed and the receiver discharged, if the defect incident to the failure to file a replication is not cured by the timely filing of a replication *nunc pro tunc*.⁹⁶

§ 2558. Irregularities as Affecting Validity of Receivership Proceedings.

Where the court has essential jurisdiction of the suit, the validity of an order appointing a receiver is not affected by any mere irregularity in the proceedings or by the fact that the court may have acted with indiscretion in granting the order. The technical insufficiency of the bill or the fact that it is subject to demurrer is immaterial.⁹⁷ For instance, the circumstance that a bill is not verified⁹⁸ or that the court is imposed upon and a receiver obtained by collusion,⁹⁹ does not affect the validity of the receivership proceedings.

Due confirmation of an irregular appointment to a receivership operates to cure the defect, and such appointment must be deemed to be valid from and after the time when the order confirming the previous irregular appointment is entered.¹⁰⁰

§ 2559. Appointment of Receiver Not Subject to Collateral Attack.

As a general rule, an order appointing a receiver is not subject to attack in a collateral proceeding;¹⁰¹ and this is true though the bill

⁹⁵ The practice is of course the same here as that which applies in regard to applications for an injunction or in regard to motions for the dissolution of an injunction. See *ante*, §§ 2333, 2407-2412.

⁹⁶ *Harrington v. Union Oil Co.* (1906) 144 Fed. 235.

⁹⁷ *Farmers' Loan & Trust Co. v. Centralia etc. Co.* (C. C. A.; 1899) 96 Fed. etc. Co. (1899) 97 Fed. 9. 636, 37 C. C. A. 528.

⁹⁸ *Clark v. Brown* (C. C. A.; 1902) 119 Fed. 130, 57 C. C. A. 76.

⁹⁹ *Sage v. Memphis etc. R. Co.* (1888) 125 U. S. 377, 31 L. ed. 698.

¹⁰⁰ *Hervey v. Illinois Midland R. Co.* (1884) 28 Fed. 169.

¹⁰¹ *Van Antwerp v. Hulburd* (1871) 8 Blatchf. 285; *Young v. Wempe* (1891) 46 Fed. 354; *Shinney v. North American*

in the cause in which the appointment was made is so irregular or imperfect as to require amendment,¹⁰² or though the appointment of the receiver is in certain respects irregular or erroneous.¹⁰³ In a suit by a receiver to get in the assets of a corporation, a debtor of the corporation cannot set up the defense that the order of the court appointing the receiver was improvident, inequitable, and erroneous. If the court has jurisdiction of the subject-matter and of the parties, the order appointing the receiver is effective and conclusive on all parties until vacated or reversed. The regularity of the appointment cannot be collaterally questioned by other tribunals.¹⁰⁴

§ 2560. Discretion of Court as Regards Terms and Conditions.

Upon appointing a receiver, the court has the power to exact such terms and impose such conditions as it sees fit upon the party in whose favor the order is made. Such conditions, however, are only to be imposed in the exercise of a proper judicial discretion. The most usual exercise of the power consists in the requirement of a bond with good security, conditioned for the indemnification of the adverse party in the event the receivership has been improperly obtained. But the imposition of terms frequently covers other conditions and contingencies, as where the court sees fit to provide for the priority of certain classes of claims such as claims for supplies and charges for operation in cases of managing receiverships.¹⁰⁵ A provision in an order appointing a receiver to the effect that the appointment is made on the express condition that all demands and liabilities due or owing by the road, including damages for personal injuries, should be paid out of the earnings of the road or other funds in the hands of the receiver or out of the proceeds of a sale, may be changed by the court so as to destroy such preference.¹⁰⁶

§ 2561. Condition Assumed by Stipulation.

As the court has power to impose terms on a plaintiff as a condition of the appointment of a receiver, so may the plaintiff by a voluntary stipulation assume a burden as a condition of such appointment.

¹⁰² *Shields v. Coleman* (1895) 157 Kansas City etc. R. Co. (1892) 53 Fed. U. S. 168, 39 L. ed. 660, 15 Sup. Ct. 570, 182; *Central Trust Co. v. St. Louis etc.*

¹⁰³ *Olmstead v. Distilling etc. Co. R. Co.* (1890) 41 Fed. 551.

(1895) 73 Fed. 44.

¹⁰⁴ *Atchison etc. R. Co. v. Osborn*

¹⁰⁴ *Gunby v. Armstrong* (C. C. A.; (1906) 148 Fed. 606, 610, 78 C. C. A.

1904) 133 Fed. 417, 427, 68 C. C. A. 627, 378.

¹⁰⁵ *Farmers' Loan & Trust Co. v.*

Gibson v. Standard Automatic Gas Engine Co. (C. C. A.; 1906) 134 Fed. 790, 67 C. C. A. 445: Creditors of an insolvent corporation in their bill asked that a managing receiver be appointed for it and that all its properties be sold. Judgments had been recovered against the company by other creditors, and it was asked that these be enjoined from selling the property under execution. One of the defendants thereupon offered to buy the property at a certain price. The plaintiffs, thinking that it should bring more under a receivership sale, replied by filing a stipulation to the effect that if a receiver were appointed and the property should finally bring less than the defendant had offered, the plaintiffs would waive all claim on their part to participate as creditors in the assets. The court acting upon this stipulation then appointed a receiver at the earnest request of the stipulators. The property finally brought less than the defendant had offered and the stipulation was enforced so as to preclude the plaintiffs from sharing in the assets.

§ 2562. Interlocutory Character of Order Appointing Receiver.

An interlocutory order appointing a receiver of a railroad and providing a scheme for holding and operating the property pending the foreclosure of the mortgage is subject to modification by later order of the court and by the final decree in the same cause. No vested rights accrue to any claimant by virtue of such interlocutory order.¹⁰⁷ But of course vested rights may accrue where they are created by and under the authority of the court and in pursuance of a decree or order made in course of the proceedings.

§ 2563. Appeal from Order Appointing Receiver.

When a receiver is appointed by an interlocutory order or decree upon a hearing in equity in a district or circuit court, or upon a hearing by a judge of such a court in vacation, an appeal lies to the circuit court of appeals. The appeal, however, must be taken within thirty days from the entry of the order or decree appointing the receiver, and it has precedence in the appellate court.¹⁰⁸ The statute granting this right of appeal applies to all orders for the appointment of a receiver, whether granted upon an *ex parte* application without notice or upon a regular motion with due notice.¹⁰⁹

¹⁰⁷ *Atchison etc. R. Co. v. Osborn Allen* (C. C. A.; 1901) 48 C. C. A. 521, (1906) 148 Fed. 606, 610, 78 C. C. A. 378
¹⁰⁸ *Act of April 14, 1906, ch. 1627, 34 Stat. L. 116.*

¹⁰⁹ *Joseph Dry Goods Co. v. Hecht* (C. C. A.; 1903) 57 C. C. A. 64, 120 Fed. 760 (construing the Act of June 6, 1900, ch. 803, 31 Stat. L. 660). This appears to be a decidedly better construction of the statute than that adopted in *Pacific Northwest Packing Co. v. this motion, an appeal will lie.*

A party who consents to the appointment of a receiver cannot on appeal complain of the order making such appointment.¹¹⁰

Scope of Receivership:

§ 2564. Property Included in Receivership.

The order appointing a receiver should clearly define the scope and extent of the receivership, and to this end it should contain a sufficient description of the property of which the receiver is to take and obtain possession. As a court has no jurisdiction to appoint a receiver where no bill has been filed, so upon appointing a receiver in any suit, it has no power to include in the receivership property that does not belong to the party against whom the proceedings are directed, or which is not in some way brought within the jurisdiction of the court in the particular suit.¹¹¹ For instance, in a foreclosure suit the receivership is properly limited to the property covered by the mortgage; and a receivership in such case will not be considered to extend to any other property than that covered by the mortgage, unless the order appointing the receiver expressly so provides.¹¹²

Scott v. Farmers' Loan etc. Co. (C. C. A.; 1895) 16 C. C. A. 358, 69 Fed. 17: Said the circuit court of appeals of the eighth circuit: "The jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the court in such a suit rightfully make any order that will prevent, hinder, or delay the other creditors of the mortgagor from subjecting the property not included in the mortgage to the payment of their debts. . . . As to all property of the debtor not included in the mortgage the mortgagee is in no better plight than if he had no mortgage."

§ 2565. Nature of Property That May Be Put in Hands of Receiver.

A receiver may, under the direction of the court, take into his possession every kind of property that may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession.¹¹³ A receiver may be appointed in a proper case to enforce and collect unnegotiable choses in action, though they are not capable of

¹¹⁰ *Little Rock Water Works Co. v. U. S.* 25, 26 L. ed. 637; *Central Trust Barret* (1881) 103 U. S. 516, 26 L. ed. Co. v. Worcester Cycle Mfg. Co. (1902) 523, 114 Fed. 659.

¹¹¹ *Hook v. Bosworth* (C. C. A.; 1894) 12 C. C. A. 208, 64 Fed. 443. ¹¹³ *Booth v. Clark* (1854) 17 How. 331, 15 L. ed. 167.

¹¹² *Smith v. McCullough* (1881) 104

manual possession. But in a case where the only property of this character was a judgment or decree of which the court itself had effectual control, the appointment of a receiver was held to be unnecessary and impracticable.¹¹⁴

§ 2566. Order Extending Scope of Receivership.

It not infrequently becomes desirable, by reason of developments occurring after the appointment of a receiver, to extend the receivership so as to make it of broader scope as regards parties or subject-matter. An order of extension can be obtained on motion in any proper case, where the parties or property in question have been brought within the jurisdiction of the court by the original bill or by a supplemental bill.¹¹⁵ Where a receiver for a railroad has been appointed under a general creditors' bill, and the receiver appointed in this proceeding has taken possession, the court will, upon the subsequent filing of a foreclosure bill by parties having a mortgage lien, extend the receivership under the creditors' bill so as to include the foreclosure proceedings, and the two suits will be thus consolidated, making the appointment of a second receivership unnecessary.¹¹⁶

An additional receiver, or receivers, may be appointed, but this step will be taken only where it appears to be essential for the protection of the rights of some of the parties interested in the property.¹¹⁷

General Effect and Incidents of Appointing Receiver.

§ 2567. Effect of Receivership on Corporate Existence and Corporate Liability.

The appointment of a receiver for a corporation does not of itself operate to dissolve the corporate body, and the corporation will still exist and may exercise any of its franchises, if such course does not interfere with the rightful management of the corporate affairs by the receiver and the same has not been enjoined by the court upon appointing the receiver.¹¹⁸ Even the transfer of possession to a

¹¹⁴ Scruggs' Exr. v. Memphis etc. R. Co. (1883) 108 U. S. 368, 27 L. ed. 756.

¹¹⁷ Wabash etc. R. Co. v. Central Trust Co. (1884) 22 Fed. 272.

¹¹⁵ Appleton Waterworks Co. v. Central Trust Co. (1899) 93 Fed. 286, 35 C. C. A. 302; Mercantile Trust Co. v. Missouri etc. Co. (1889) 41 Fed. 8.

¹¹⁸ Chemical Nat. Bank v. Hartford Deposit Co. (1896) 161 U. S. 1, 40 L. ed. 595; Johnson v. Southern Bldg. etc. Assoc. (1899) 99 Fed. 846; Second Nat.

¹¹⁶ St. Louis etc. R. Co. v. Continental Trust Co. (C. C. A.; 1901) 49 C. C. A. 529, 111 Fed. 669; Lloyd v. Chesapeake etc. R. Co. (1895) 65 Fed. 361. See Central Trust Co. v. Wabash etc. R. Co. (1885) 23 Fed. 863.

Bank v. New York Silk Mfg. Co. (1883) 11 Fed. 532; Fidelity Insurance etc. Deposit Co. v. Norfolk etc. R. Co. (1902) 114 Fed. 389.

receiver will not relieve the corporation of liability, unless the possession of the receiver is exclusive and control is entirely vested in him.¹¹⁹

§ 2568. Election of Corporate Officers.

The putting of property of a railroad into the hands of a receiver does not necessarily have the effect of giving the court jurisdiction over the matter of the election of corporate officers, and a meeting may be permitted for this purpose notwithstanding the existence of the receivership.¹²⁰

§ 2569. Effect of Receivership on Pending Suits.

Actions pending against the person over whose property a receiver is appointed do not abate upon such appointment. Nor does the right to defend or prosecute pending suits vest in the receiver by virtue of his appointment. The receiver has no status in such suits except as he is properly made a party thereto, and he has only such powers as the court expressly confers on him.¹²¹ It follows that one who has commenced an action, before the appointment of a receiver of the debtor's property, may prosecute the same to judgment, and the judgment so obtained is a proper claim against the receivership. The correct procedure is for the plaintiff in such suit to file his judgment as a claim in the receivership proceeding. And the claim may be so filed before the judgment is actually obtained, without prejudice to the right further to prosecute the suit.¹²² If the judgment obtained in a suit prosecuted against the company whose property has been put in the hands of a receiver is for any reason invalid, it will not be allowed as a claim in the receivership proceedings; and the receiver may of course take advantage of the invalidity of the judgment.¹²³

§ 2570. When Pending Suit Abates.

Where, in addition to the appointment of a receiver, a corporation is dissolved, or otherwise destroyed, pending suits by or against the

¹¹⁹ *Railroad Co. v. Brown* (1873) 17 Second Nat. Bank *v. New York Silk Mfg. Co.* (1882) 11 Fed. 532. See *Calhoun v. Wall*, 445, 21 L. ed. 675.

¹²⁰ *Taylor v. Philadelphia etc. R. Co.* *Lanaux* (1888) 127 U. S. 634, 639, 32 L. ed. 297, 299, 8 Sup. Ct. 1345 (*semble*). (1881) 7 Fed. 381.

¹²¹ *Wilder v. City of New Orleans* (C. C. A.; 1898) 87 Fed. 843, 31 C. C. Car Works (1893) 53 Fed. 853. ¹²² *Pine Lake Iron Co. v. La Fayette A. 249; Mercantile Trust Co. v. Pittsburgh etc. R. Co.* (1887) 29 Fed. 732; U. S. 640, 36 L. ed. 574; ¹²³ *Pendleton v. Russell* (1892) 144

corporation necessarily abate in the absence of a statute to the contrary;¹²⁴ and any judgment obtained in the action against the dissolved corporation is invalid, unless the receiver is made a party to the proceedings.¹²⁵

§ 2571. Making Receiver Party to Pending Suit.

If a receiver desires to be made a party to a pending suit, or to be substituted as plaintiff or defendant, or to intervene therein, the court will usually entertain an application by him to that effect.¹²⁶ But the adverse party has no right to insist on such a change of parties, and a refusal of the trial court to allow it at the suggestion of the adverse party is not reversible error.¹²⁷

1. *Pendleton v. Russell* (1892) 144 U. S. 640, 38 L. ed. 574; 12 Sup. Ct. 743: Upon appointment of a receiver for a corporation, he found a suit pending against it on appeal in the supreme court. He thereupon obtained permission of his court to employ, and did employ, counsel to represent the company upon the appeal. Upon the suit being there decided in favor of the company and reversed, the receiver procured the mandate to be sent to the lower court in order that the judgment of that court might be vacated in accordance with the mandate. It was held that such participation in the litigation did not make the receiver a party to the action.

2. *Mercantile Trust Co. v. Pittsburgh etc. R. Co.* (1887) 29 Fed. 732: In discussing the effect of the appointment of a railroad receiver in a federal court on an action pending in a state court, it was said: "The appointment by this court of the receivers did not oust the jurisdiction which the court of common pleas had previously acquired of the proceedings against the railroad company instituted by the petitioner for the ascertainment of his damages, nor did it operate as a stay thereof. Neither was the petitioner bound to bring in the receivers as defendants, as he was seeking no relief against them. It was their business to intervene, and make defense if they wished to do so. The master was therefore correct in his determination that the petitioner's rights as a judgment creditor are not to be denied recognition simply because he proceeded in the prosecution of his suit without making the receivers parties, or notice to them, and without leave of this court."

§ 2572. Receiver Concluded by Prior Steps in Litigation:

A receiver upon coming into a suit previously instituted against the company over which he is made receiver is bound by the record

¹²⁴ *First Nat. Bank v. Colby* (1874) interest in the subject-matter of the 21 Wall. 609, 22 L. ed. 687; *Greeley v. suit that ought to be protected in such Smith* (1845) 3 Story, 657. proceeding. *Bowen v. Needles Nat. Bank*

¹²⁵ *Pendleton v. Russell* (1892) 144 U. (1896) 76 Fed. 177. S. 640, 38 L. ed. 574.

¹²⁶ *Perry v. Godbe* (1897) 82 Fed. 141. ¹²⁷ *Missouri etc. Trust Co. v. Ger-* man Nat. Bank (C. C. A.; 1896) 77 Fed. A receiver of a national bank will be 117, 23 C. C. A. 65, permitted to intervene when he has an

as it exists at that time. Thus a default suffered by the company prior to the appointment of the receiver is, in the absence of fraud or collusion, as binding on him as if he had suffered the default himself.¹²⁸

§ 2573. Right of Receiver to Counterclaim or Set Off against Intervenor.

A receiver does not, by virtue of his appointment merely, become a party defendant to the litigation in which he is made receiver; and he cannot maintain, without regular service of process at least, a counterclaim or set off against an intervening petitioner who has come in on a reference before the master to establish a claim held by himself. The proper proceeding is for the receiver, by leave of the court, if necessary, to sue independently in his own name.¹²⁹

¹²⁸ *Perry v. Godbe* (1897) 82 Fed. 141. ¹²⁹ *Youtsey v. Hoffman* (1901) 108 Fed. 693. Eq. Prac. Vol. II. —94.

CHAPTER LXII.

RECEIVERS (continued).

Who May Be Receiver.

- § 2574. Receiver Must Be Disinterested.
- 2575. Parties Ineligible Because of Interest.
- 2576. Eligibility of Corporate Officer or Stockholder.
- 2577. When Interested Party Eligible to Be Receiver.
- 2578. Qualifications of Operating Receiver.
- 2579. Place of Residence as Affecting Eligibility.
- 2580. Interest in Reorganization Scheme.
- 2581. Appointment of Same Person in Federal and State Court.

Title, Interest, and Possession of Receiver.

- 2582. Fiduciary Nature of Receiver's Interest.
- 2583. Representative Capacity of Receiver.
- 2584. Continuity of Receivership.
- 2585. Possession of Receiver Is Possession of Court.
- 2586. Title of Receiver Dates from Order of Appointment.
- 2587. Qualification of Receiver by Giving Bond.
- 2588. Property Beyond Jurisdiction of Court.
- 2589. Actual Seizure by Receiver Unnecessary.
- 2590. Order for Receiver to Take Possession.
- 2591. Duty of Person in Possession to Surrender to Receiver.
- 2592. Summary Petition to Enforce Delivery of Property to Receiver.
- 2593. When Receiver Proceeds by Independent Suit.
- 2594. Bringing Stranger in as Defendant in Main Suit.
- 2595. Waiver of Informality as to Mode of Procedure.
- 2596. Court's Control over Receiver's Independent Suit.

Interference with Possession of Receiver.

- 2597. Nature of Receiver's Possession.
- 2598. Court's Protection of Receiver.
- 2599. Usual Injunction against Interfering with Receiver.
- 2600. Receiver's Proceeding to Obtain Injunction.
- 2601. Proceeding in Case of Conflicting Receiverships.
- 2602. Exemption of Property in Hands of Receiver.
- 2603. Tax Warrant Not Leviable on Property in Hands of Receiver.
- 2604. Power of Trustee to Deal with Receivership Property.

Disposition of Prior Liens.

- 2605. Conduct of Receivership Proceedings with Reference to Adverse Liens and Claims.

- § 2606. Court's Control over Liens Claimed by Outsiders.
- 2607. Practice as to Satisfaction of Prior Liens.
- 2608. When Lienor Permitted to Enforce Lien Directly.
- 2609. Enforcing Mechanic's Lien on Receivership Property.
- 2610. Order for Surrender of Property to Claimant.
- 2611. Formalities Incident to Compliance with Such Order.
- 2612. Reimbursement of Fund or Property Appropriated by Receiver.

Who May Be Receiver.

§ 2574. Receiver Must Be Disinterested.

The person appointed receiver should, as a rule, be an independent and disinterested person, and impartial and indifferent as between the parties to the controversy. A receiver ought not to be appointed to represent the particular interests of one class, nor to represent one interest out of a class of interests. He should not have such personal interest as would interfere with an unbiased and impartial exercise of his duties.¹ The receiver is solely the officer of the court. He must be, in the full sense of the term, the representative of the court. He is in no way the representative of either party. His past relations, the influences that suggest and procure his appointment, his sympathies from whatever cause, must not be such as to predispose him either way.² He should not be interested in the determination of the suit one way or the other, or associated or connected with any one who is.³

§ 2575. Parties Ineligible Because of Interest.

Persons who are of counsel for either of the parties or who have been identified with the management that brought about the embarrassment resulting in the receivership are considered ineligible to appointment as receivers.⁴ The circumstance that a particular person is related to some of the very numerous parties to a suit will not prevent his appointment as receiver where he is exceptionally well qualified for the duties of the office and the appointment is sanctioned by the great majority of those who have a right to be heard in such matter.⁵

¹ Booth *v.* Clark (1854) 17 How. 330, ³ Finance Co. *v.* Charleston etc. R. 15 L. ed. 167; Davis *v.* Gray (1872) 16 Co. (1891) 45 Fed. 436. Wall. 203, 21 L. ed. 447; Atkins *v.* ⁴ Finance Co. *v.* Charleston etc. R. Co. Wabash etc. R. Co. (1886) 29 Fed. 161; (1891) 45 Fed. 436; State Trust Co. *v.* Taylor *v.* Life Assoc. of America (1880) Nat. Land etc. Co. (1893) 72 Fed. 575. 3 Fed. 469; Meier *v.* Kansas Pacific R. ⁵ Bowling Green etc. Co. *v.* Virginia Co. (1878) 5 Dill. 479. etc. Co. (1904) 133 Fed. 186; Ralston *v.* Washington etc. R. Co. (1895) 65 Fed. 557.

² Wood *v.* Oregon Development Co. (1893) 55 Fed. 901,

§ 2576. Eligibility of Corporate Officer or Stockholder.

Officers, directors, or stockholders in a corporation will not be appointed to the office of receiver of the corporation unless the case is exceptional, and then only on the consent of parties whose interests are to be intrusted to their charge.⁶ However, the rule that disqualifies officers and stockholders and other persons interested in or connected with the management of the business over which the receivership is to be appointed is not an unbending rule; and the matter of the eligibility of any particular person is one to be determined by judicial discretion.⁷ An officer who has speculated in the stock of a corporation will not be appointed a receiver of its properties, especially where he appears to be short of the stock in a deal on the stock exchange; for his interest in such transaction would be furthered by the depreciation of the stock, while his duty as receiver would require him to do everything possible to enhance its value.⁸

§ 2577. When Interested Party Eligible to Be Receiver.

The rule requiring the receiver to be indifferent and disinterested as between the parties does not apply where there is no question as to who is entitled to the property in litigation. If the right is wholly determined in favor of one party, it is proper that the receiver should represent or be identified in interest with that party.

Shainwald v. Lewis (1881) 8 Fed. 878: In a creditor's suit, the defendant was clearly shown to have been guilty of fraud and admittedly had transferred and secreted property which he refused to surrender, on the order of the court, to satisfy the money decree rendered against him. The court thereupon appointed a receiver and compelled the defendant to execute a general assignment to such receiver. It was held that this was not a case where the receiver should be a disinterested person. His duty was to ferret out the fraudulent transactions of the defendant and recover that property for the benefit of the creditors. Consequently, it was desirable that the receiver should be the interested and zealous adversary of the defendant.

Furthermore, the court indicated that the receiver might properly employ, as his counsel, the lawyer who had represented the plaintiff in the bill. The case was quite different from that which is presented in foreclosure suits and suits for the dissolution of a partnership. In these situations the receiver should be disinterested and should hold indifferently for the party finally adjudged to be

⁶ *Atkins v. Wabash etc. R. Co.* (1886) President of corporation appointed as 29 Fed. 161. See *Buck v. Piedmont etc.* receiver for it, *Davis v. Duncan* (1884) Ins. Co. (1880) 4 Hughes 415, 4 Fed. 19 Fed. 481. 849. ⁸ *Olmstead v. Distilling & Cattle Feed-*

⁷ *Fowler v. Jarvis-Conklin etc. Co.* (1895) 67 Fed. 24. (1894) 63 Fed. 888 (1894) 66 Fed. 14.

entitled. But here there was no question as to the right to the fund. That had been adjudged against the defendant.

§ 2578. Qualifications of Operating Receiver.

The matter of the qualifications of the receiver is one of great moment and delicacy in situations requiring special knowledge and aptitude for the business, as where a railroad is to be taken in hand and operated in receivership proceedings. In choosing receivers to fill such responsible position, the courts are often compelled to look more to their special qualifications for the particular business, than to their relation or connection with the enterprise prior to the receivership.

Farmers' Loan etc. Co. v. Northern Pac. R. Co. (1894) 61 Fed. 546: Application was made for the removal of a railroad receiver on the ground that he was and had long been an officer of the company and as such was responsible, with others, for the state of affairs that brought the company into straits. However, it appeared that he was entirely competent and of much experience in this business, furthermore that his appointment as receiver had been made with the consent of the great majority of those interested in the affairs of the road. In refusing to remove him, Jenkins, Circuit Judge, said: "A receiver should, in a large sense, be indifferent, as between the various interests involved. He should have no such personal interest as would interfere with an unbiased and impartial exercise of his duties as receiver. I quite agree with the doctrine that, in general, one who was a director or managing officer of a corporation at the time of its suspension ought not to be appointed its receiver. . . . The rule, however, is not inflexible, and is necessarily departed from when it is apparent, in view of the knowledge and familiarity of a particular person with the estate taken in charge by the court, that its best interests will be promoted by his appointment. . . . The case of a railway furnishes, perhaps, the most notable instance of the necessity of departure from the rule. Railway management has become a profession. A railway is not a toy that may be trifled with. Its management requires great financial and executive ability, and the practical experience of years. Railway management stands apart as a specialty. The ablest men in other professions and in other walks of life would probably fail in the successful direction of the affairs of a railway, if they are wanting in that knowledge of its needs and requirements that may only be obtained by long experience in its practical management and operation."

§ 2579. Place of Residence as Affecting Eligibility.

The courts are disinclined to appoint a non-resident to be receiver, and certainly the appointment of a non-resident is improper where he intends and is expected to remain in a remote state and beyond the jurisdiction of the court.* But non-residence alone is not an absolute

* *Meier v. Kansas Pacific R. Co.* (1878) 5 Dill. 476, Fed. Cas. No. 9,395.

disqualification for the office of receiver, and a non-resident may be appointed if he is a desirable person on other grounds.¹⁰ The circumstance that a person is not a citizen of the particular state in which a railroad is incorporated and where it wholly or mostly lies does not disqualify him to be appointed receiver.¹¹

§ 2580. Interest in Reorganization Scheme.

While the receivership should be impartial between all the interests represented in the suit, it has sometimes been held permissible for the receiver to become a member of a reorganization committee gotten together for the purpose of putting the company on its feet again.¹² But where there are conflicting plans of reorganization, and where trouble between different interests is foreshadowed, he should not be identified with either. In the case noted below, the court required its receiver, under such conditions, to resign from the reorganization committee.¹³

§ 2581. Appointment of Same Person in Federal and State Court.

A proper person already appointed as receiver in a state court may well be appointed as receiver in the federal court of other property affecting the same or similar interests, there being no such conflict between the courts as would deprive the federal court of jurisdiction.¹⁴ But the federal court will not, on grounds of comity, appoint as receiver one who has already been appointed receiver in a state court, where it appears that the appointment by the state court was suggested and procured by a particular party in its own interest and not in the interest of all the creditors.¹⁵

Title, Interest, and Possession of Receiver.

§ 2582. Fiduciary Nature of Receiver's Interest.

The receiver is entitled to have and hold for the purposes of his trust all property and funds belonging to the person or company of whose property he is made general receiver.¹⁶ His interest is that

¹⁰ *Bayne v. Brewer Pottery Co.* (1897) 82 Fed. 391; *Stanton v. Alabama etc. R. etc. Co.* (1893) 72 Fed. 575. Co. (1875) Fed. Cas. No. 13,296.

¹¹ *Farmers' Loan & Trust Co. v. Cape Fear etc. R. Co.* (1894) 62 Fed. 675. (1893) 56 Fed. 273.

¹² *Clarke v. Central R. etc. Co.* (1893) (1905) 134 Fed. 924. 66 Fed. 16.

¹³ *Fowler v. Jarvis-Conklin Mortg. Co.* (1894) 63 Fed. 888. A check for a retainer's fee was delivered by the defendant company to one B. its regularly retained counsel. Before the

of a person occupying a fiduciary relation, and he will not be permitted to acquire any rights antagonistic to those of the parties who are interested in the trust estate unless he shows entire good faith.¹⁷ He is not a purchaser for value, and his rights in the property that comes into his hands as receiver are not greater than those possessed by the insolvent in whose right he claims.¹⁸ On the other hand, the receiver is not an assignee and the principles of common law applicable to assignees do not define or determine the character of a receiver's possession or its effect upon the rights of those interested in the property in their possession.¹⁹

§ 2583. Representative Capacity of Receiver.

Receivers are not individually responsible upon their official contracts or for torts committed by their subordinates. Such liability as they thus incur is incurred in their official capacity, and judgments against them are payable only from the funds in their hands. As has been said by Mr. Justice Brown: "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands."²⁰

A receiver is not liable for a tort committed prior to his appointment by the railroad over which he is made receiver.²¹

§ 2584. Continuity of Receivership.

Every receivership is a unit regardless of mutations in the personnel of the receivers. It has been observed that a receivership is, in this respect, in the nature of a corporation sole.²² Therefore if one receiver becomes officially liable, his successor in the same proceedings will be likewise bound. So long as the property remains in the

check was collected a receiver was appointed for the company and B had notice of this fact. He then collected the money on the check. On the motion of the receiver he was ordered to turn the money over to the receiver. Bowker v. etc. Co. (1880) 146 Fed. 257.

¹⁷ Farley v. Hill (1893) 150 U. S. 575, 37 L. ed. 1187.

¹⁸ Auten v. City Electric etc. R. Co. (1900) 104 Fed. 395.

¹⁹ New York etc. R. Co. v. New York etc. R. Co. (1893) 58 Fed. 268, 278.

²⁰ McNulta v. Lochridge (1891) 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. 11; American Bonding etc. Co. v. Baltimore etc. R. Co. (C. C. A.; 1903) 60 C. C. A. 52, 124 Fed. 866, 877. See Farmers' Loan etc. Co. v. Central R. Co. (1880) 7 Fed. 537; Davis v. Duncan (1884) 19 Fed. 477.

²¹ Finance Co. v. Charleston etc. R. Co. (1891) 46 Fed. 508; Northern Pac.

R. Co. v. Heflin (C. C. A.; 1897) 83 Fed. 93, 27 C. C. A. 460.

²² Central etc. Co. v. Farmers' etc. Co. (1902) 113 Fed. 405, 413.

custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property. The receivership is but one thing, and there is a continuity of succession as between different receivers until the proceedings are finally terminated.²³

§ 2585. Possession of Receiver Is Possession of Court.

The receiver, as is often said, is considered to be the hand of the court, and property in his possession is in the custody of the court. He represents neither party, and acts for neither party; but merely holds the property for disposition at the end of the litigation for the benefit of all, or for the benefit of the particular party who may appear to be entitled.²⁴ It follows that the appointment of a receiver does not oust any party of his right to the possession, and the possession of the receiver is in no sense hostile or inconsistent with the right or interest of any party. He merely retains it for the benefit of the one who ultimately establishes his right thereto. When the party entitled to the property has been ascertained, the receiver is considered his receiver.²⁵ The property is merely taken by the court and is put into the hands of its officer to hold for the benefit of whom it may concern.²⁶

§ 2586. Title of Receiver Dates from Order of Appointment.

It is fully established that the status of the property and the relations towards it of all parties interested in it are fixed by the order appointing the receiver.²⁷ The title and interest of the receiver has its inception in such order. The moment the receiver is appointed he becomes the officer or agent of the court, and from that time the property committed to him is in custody of law, and the court has power to preserve and protect it. It has been observed that if the jurisdiction of the court over the property did not attach

²³ McNulta v. Lochridge (1891) 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. 11.

²⁵ Wiswall v. Sampson (1882) 14

How. 65, 14 L. ed. 328; Booth v. Clark

²⁴ Union Bank of Chicago v. Kansas (1855) 17 How. 322, 15 L. ed. 164; City Bank (1890) 136 U. S. 223, 236, 34 L. ed. 341, 346; *In re Tyler* (1893) 136 U. S. 223, 34 L. ed. 149 U. S. 184, 37 L. ed. 699; Central

²⁶ Central Trust Co. v. Worcester

Trust Co. v. St. Louis R. Co. (1890) 41 Fed. 555; DeVisser v. Blackstone Cycle Mfg. Co. (1899) 35 C. C. A. 547, (1868) 6 Blatchf. 235; *In re Merchants' Ins. Co.* (1871) 3 Biss. 165. See Naum-

²⁷ Commonwealth Roofing Co. v. North

burg v. Hyatt (1885) 24 Fed. 898; Central Trust Co. v. Wabash etc. R. Co. (1885) 23 Fed. 863, 868.

American Trust Co. (C. C. A.; 1905) 68 C. C. A. 418, 135 Fed. 284, 290.

contemporaneously with the order appointing the receiver, the purpose of the court in appointing a receiver might be defeated by the failure of the person appointed to accept the position, by his inability to give bond, or by the interim acts of strangers in securing judgments or making other efforts to obtain advantage.²⁸

§ 2587. Qualification of Receiver by Giving Bond.

The order appointing the receiver usually makes his right and title contingent upon his subsequent qualification and upon the giving of a bond by him. Where the order of appointment requires the receiver, before entering on the duties of his office, to execute a bond, and such bond is subsequently executed and approved by the judge, the receiver's official tenure is held to relate back to the date of the order of appointment;²⁹ and judgments obtained by third parties in the period between the appointment of the receiver and his subsequent qualification are invalid and create no lien.³⁰

§ 2588. Property Beyond Jurisdiction of Court.

The principle just stated does not apply as regards property situated in another state and beyond the jurisdiction of the court appointing the receiver. The status of such property depends on the law and policy of the state where it is located.³¹

§ 2589. Actual Seizure by Receiver Unnecessary.

From the doctrine that the title of the receiver upon qualification relates back to the order of appointment, it follows that actual manual seizure by the receiver is not essential to prevent the acquisition of liens by others upon the property by assignment, judgment, execution, attachment, or otherwise.³² It appears to be the rule in some of the state courts that the title of the receiver dates from the time of his

²⁸ Connecticut River Banking Co. v. See Commonwealth Roofing Co. v. North American Trust Co. (C. C. A.; 1905) 68 firm'd Temple v. Glasgow (1897) 80 C. C. A. 418, 135 Fed. 985. Fed. 441, 25 C. C. A. 540; Fidelity Ins. etc. Co. v. Roanoke Iron Co. (1896) 81 Fed. 439.

²⁹ Horn v. Pere Marquette R. Co. (C. C.; 1907) 151 Fed. 633; Illinois Steel Co. v. Putnam (C. C. A.; 1895) 15 C. C. A. 556, 68 Fed. 515; Adams v. Trust Co. (C. C. A.; 1895) 15 C. C. A. 1, 66 Fed. 617.

³⁰ Connecticut River Banking Co. v. Rockbridge Co. (1895) 73 Fed. 709, 712. ³¹ Zacher v. Fidelity Trust etc. Co. (C. C. A.; 1901) 45 C. C. A. 480, 106 Fed. 593; Morrill v. American Reserve Co. (C. C. A.; 1907) 151 Fed. 305.

³² Horn v. Pere Marquette R. Co. (C. C.; 1907) 151 Fed. 633; Connecticut River Banking Co. v. Rockbridge Co. (1895) 73 Fed. 709; Temple v. Glasgow (1897) 80 Fed. 441, 25 C. C. A. 540; East Tenn. etc. R. Co. v. Atlanta etc. R. Co. (1892) 49 Fed. 608, 610, 15 L.R.A. 100.

qualification or from the time when he takes actual possession,³³ but this notion does not prevail in the federal courts.

§ 2590. Order for Receiver to Take Possession.

The mere appointment of the receiver does not transfer possession to him;³⁴ but the appointment of a receiver carries with it, by implication, the duty on his part of taking possession, and the further duty on the part of those in possession of yielding such possession.³⁵ It is customary to insert in the order appointing a receiver instructions to the effect that the receiver shall take possession of the property in question and that individuals having charge of the property and affairs of the insolvent shall turn the same over to the receiver upon demand.

American Construction Co. v. Jacksonville etc. Co. (1892) 52 Fed. 937: The order ran that the receiver should be given possession of "all and every part of the properties, interests, effects, moneys, receipts, earnings," etc., of the road over which he was made receiver, and that "all books, vouchers, and papers touching the operation of said railroad," as well as its "books of account," should be turned over to him. This was held to include the corporate seal of the company and all books and accounts of every kind bearing on the past as well as the present and future.

§ 2591. Duty of Person in Possession to Surrender to Receiver.

The servant, agent, or employee of the insolvent, or any other individual, who refuses upon proper order of the court to turn over property to the receiver, is guilty of a contempt and will be punished for his disobedience.³⁶ It has been held that an officer of an insolvent corporation has no right to retain notes or books of the corporation on the claim that he has a lien or mere equity in them. He should deliver the property and look to the court to protect his alleged lien.³⁷

§ 2592. Summary Petition to Enforce Delivery of Property to Receiver.

If property is wrongfully withheld from a receiver by a defendant or by his agent, servant, or employee, or by any other person who is a party to the suit, a proper procedure whereby to enforce the sur-

³³ *Bank of Woodland v. Heron* (1898) 120 Cal. 614, 52 Pac. 1006; *Everett v. Neff* (1867) 28 Md. 176; *Farmers' Bank v. Beaston* (1838) 7 Gill & J. 421, 28 Am. Dec. 226.

³⁴ *Booth v. Clark* (1854) 17 How. 331, 15 L. ed. 167.

³⁵ *Highland Ave. etc. R. Co. v. Columbian Equipment Co.* (1898) 168 U. S. 630, 42 L. ed. 606.

³⁶ *American Const. Co. v. Jacksonville etc. Co.* (1892) 52 Fed. 937.

³⁷ *Tinsley v. Anderson* (1898) 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. 805.

render of the property is by a summary petition in the cause. Such petition is filed by the receiver, and upon a proper showing by him the court will order the person having possession of the property to surrender it. The proceeding by summary petition has also been held to be proper where the person having possession of the property holds as a trustee of the person or corporation over whose property the receiver has been appointed.

Miles v. New South etc. Ass'n (1899) 95 Fed. 919: A receiver was appointed for a building and loan association, and as such he became entitled to all its assets. A certain trust company held in its hands as trustee a large amount of the assets of the association. These were held to secure bonds issued by the association and also to secure other creditors. The receiver demanded those assets of the trust company, and upon its refusal to surrender the same, filed a petition in the cause for an order compelling the trust company to turn such assets over. It was insisted for the trust company that the court had no jurisdiction to proceed in this summary way and that the receiver should be required to bring an independent suit. But the order was granted nevertheless. Shelby, Circuit Judge, stated the principle here applicable in a full and quite satisfactory way: "The practice of requiring the surrender of property to the receiver by summary motion or petition is well recognized where it is held by the attorneys, agents, and employees of the defendant. The same practice seems not improper where the property in question is held by a defendant in the motion, not for himself, but as trustee, and so, in a sense, as the agent, for those interested in the assets, including the defendant in the case. In modern litigation in equity a defendant's property may be in the possession of hundreds of agents and bailees, holding under various agreements, and it is not reasonable that a receiver appointed of all the assets should be required to sue each bailee and agent separately, or that all should be made parties to the main suit, should they merely refuse to surrender the assets."

§ 2593. When Receiver Proceeds by Independent Suit.

When a receiver claims a right to have possession of property that is withheld from him by one who is not an actual party to the receiver-ship proceeding, and who is not an agent, servant, or employee of such, the question whether the receiver can proceed against such stranger by petition in the cause wherein he was appointed receiver or must bring an independent suit, depends upon the question as to when and how the stranger acquired possession. If he obtained possession and acquired his rights before the receiver was appointed, the receiver cannot proceed summarily by petition but must bring an independent action or suit. Here the party asserting the right adverse to the receiver is entitled to say, "as to that fund, I claim adversely and demand that you proceed in the ordinary way to try the question

whether my prior possession can be rightfully disturbed by an order in a case to which I was not a party.”³⁸

On the other hand, if the stranger obtained possession and acquired his rights subsequent to the appointment of the receiver, and consequently after the receiver’s right to possession had attached, then the receiver may proceed by petition in the cause. The time of the sequestration or equitable seizure effected by the appointment of the receiver is determinative on this point. One who acquires and holds possession of the receivership property after the court has given the receiver the right to possession holds in disobedience to the orders of the court and is therefore subject to its jurisdiction in that cause. The right of the receiver to maintain such a petition does not depend upon whether the actual possession of the receiver has been disturbed but upon the question whether the other party is obstructing and preventing the receiver from taking actual possession. The principle is the same whether the property is of a tangible kind or is merely a chose in action, such as a bank deposit.³⁹

If a receiver proceeds by petition or motion in the receivership cause against a stranger who withholds possession, and the answer of such person to the petition sets up a right or title in himself adverse to that of the receiver, and such person claims a right of jury trial, the court may properly dismiss the petition and remit the receiver to his action at law.⁴⁰

§ 2594. Bringing Stranger in as Defendant in Main Suit.

Another mode of procedure by which the receiver may get control over the property appertaining to the receivership in the possession of a person who is not a party to the suit, is for the plaintiff in the original bill to make such party a defendant in the suit by supplemental or amended bill, and then on motion to have the receivership extended to such property and procure an order for him to surrender it. But this procedure is not always practicable or convenient.⁴¹

§ 2595. Waiver of Informality as to Mode of Procedure.

If the receiver improperly proceeds by petition in a situation where he ought to proceed by an independent suit, the objection should be

³⁸ *Wheaton v. Daily Tel. Co.* (C. C. 71 Fed. 400, 18 C. C. A. 102; Bibber A.; 1903) 59 C. C. A. 427, 124 Fed. 61. *White Co. v. White River etc. R. Co.*

³⁹ *Horn v. Pere Marquette R. Co.* (1901) 107 Fed. 176.

(C. C. A.; 1907) 151 Fed. 629, 630. ⁴¹ *Miles v. New South etc. Assoc.*

⁴⁰ *Sullivan v. Colby* (C. C. A.; 1896) (1899) 95 Fed. 919, 920.

made by motion, demurrer, or plea. By answering to the merits the defendant in the petition submits to the jurisdiction of the court in this respect and apparently waives the defect as to the mode of proceeding.⁴²

§ 2596. Court's Control over Receiver's Independent Suit.

A court that has authorized its receiver to institute an independent action against a stranger may entertain a motion made by the latter to have the action in question dismissed. But where the ground of the application is such that it could be put in as a defense to that action, the application will not be granted except in a very clear case.⁴³

Interference with Possession of Receiver.

§ 2597. Nature of Receiver's Possession.

As property in the possession of a receiver is considered to be in the possession of the court that appointed him, any attempt to interfere with the property in his hands is a contempt of court.⁴⁴ The court will at any time, upon a proper showing, protect the possession of a receiver; and to this end it will entertain contempt proceedings against the party interfering with the receiver's possession, or use its injunctive process upon any proper occasion, as where an attempt is made to seize the property or to levy a tax warrant thereon or where continuous trespasses are made upon the property.

§ 2598. Court's Protection of Receiver.

A combination and conspiracy among the employees of a railroad receiver to hinder and delay operation of the road, when followed by overt acts of intimidation and violence, will be punished as a contempt of court.⁴⁵ On the principle of protecting its receiver in the possession and use of street railway property committed to his care, the court may enjoin another railroad company from taking proceedings to condemn to its use land held by the receiver. And, *a fortiori*, it will enjoin an appropriation attempted without color of legal proceedinga.⁴⁶

⁴² *Horn v. Pere Marquette R. Co.* (1886) 27 Fed. 443; *United States v. C. C. A.*; 1907) 151 Fed. 829, 890. ⁴³ *Murphy* (1890) 44 Fed. 39; *Thomas v. Cincinnati etc. R. Co.* (1894) 62 Fed. 803; *In re Acker* (1894) 66 Fed. 290.

⁴⁴ *Pakradooni v. Storey Cotton Co.* (1907) 151 Fed. 807.

⁴⁵ *Tinsley v. Anderson* (1898) 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. 805; ⁴⁶ *In re Higgins* (1886) 27 Fed. 443. ⁴⁶ *Fidelity Trust etc. Co. v. Mobile etc. R. Co.* (1892) 53 Fed. 687. *In re Swan* (1893) 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. 225; *In re Higgins*

§ 2599. Usual Injunction against Interfering with Receiver.

The usual injunction granted upon the appointment of a receiver for an insolvent corporation runs to the effect that the directors, stockholders, agents, and servants of the company, and all other persons having notice of the order, shall refrain from interfering with the receiver in the discharge of his duties or with the property of the corporation, and that said directors, officers, and agents shall refrain from collecting any of the debts or demands of the company and from disposing of or transferring any of its property.⁴⁷

§ 2600. Receiver's Proceeding to Obtain Injunction.

A receiver desiring to obtain the assistance of an injunction to protect his possession or to prevent any unwarranted interference with his management of the receivership may proceed either by a petition in the cause or by an original bill. If the person sought to be enjoined is a party to the suit, or in privity with a party, the receiver naturally proceeds by petition in the cause. If the person is a stranger, either mode of procedure may be adopted. But in determining which mode should be pursued the purpose of the court will be to guard against any undue advantage being taken of the defendant. He must, it is held, have full opportunity to assert his defense. If this right can be properly guarded only by an original proceeding by bill and answer, this mode must be adopted. The question rests in the discretion of the court. If no right of the defendant can be prejudiced by proceeding upon petition, this method will be sanctioned.⁴⁸

§ 2601. Proceeding in Case of Conflicting Receiverships.

If a controversy arises between two receivers of different properties appointed by the same court concerning the right to possession of property in the hands of one of them, the proper mode of proceeding is by petition in the cause wherein the latter receiver was appointed, asking the court that he be ordered to turn the property over.⁴⁹

⁴⁷ *Williams v. Hintermeister* (1886) (C. C. A.; 1900) 103 Fed. 227, 43 C. C. A. 26 Fed. 889; *Sands v. Greeley* (C. C. A.; 1891) 189; *Bibber-White Co. v. White etc. R.* 1898) 31 C. C. A. 424, 88 Fed. 131; *John-
son v. Southern Bldg. etc. Co.* (1899) 99 Co. (1901) 107 Fed. 176. ⁴⁹ *Comer v. Felton* (C. C. A.; 1894) Fed. 647. ⁶¹ Fed. 731, 10 C. C. A. 28.

⁴⁸ *Lake Shore etc. R. Co. v. Felton*

§ 2602. Exemption of Property in Hands of Receiver.

One manifestation of the principle by which property in the possession of the receiver is considered to be *in custodia legis* and therefore under the protection of the court is found in the rule that property in the hands of a receiver is exempt from judicial process, except, of course, so far as may be permitted by the court itself that appointed the receiver. It is a general rule that property in the hands of a receiver cannot be sold under attachment or execution, unless leave of the court before which the receivership proceedings are pending is first duly obtained. The leading authority on this point, so far as the federal courts are concerned, is found in the following case; and it will be noted that the doctrine of this case goes to the extent of denying any validity whatever to an execution or attachment sale of property in the hands of a receiver, though the levy may be made prior to the time when the receiver acquires possession. The mere fact that the receiver takes possession operates as an inhibition upon proceedings instituted in any other court to subject the property.

Wiswall v. Sampson (1852) 14 How. 52, 65, 14 L. ed. 322, 328: A bill was filed by a creditor to set aside a conveyance of real property as fraudulent. A receiver was asked for, but before one was appointed an execution was levied on the land at the instance of another creditor. Subsequently a decree was entered in the equity suit declaring the conveyance in question void and appointing a receiver. The receiver then took possession of the land; and while he was acting as receiver, a sale was made under the execution that had been levied prior to the appointment of the receiver. This sale under execution was held to be void, because the land was then in the possession of the receiver and therefore in the custody of the court.

Said Mr. Justice Nelson: "When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. . . . The doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined *pro interessu suo*; and this, though their right to the possession is clear."⁵⁰

⁵⁰ Among many subsequent cases in which *Wiswall v. Sampson* has been approved and followed are these: *Heidsteel v. Bone* (1860) 5 Biss. 69, Fed. Cas. No. 155; *Perego v. Boneritter v. Elizabeth etc. Co.* (1884) 112 U. 10,976; *Thompson v. Scott* (1876) 4 Dill. S. 303, 28 L. ed. 732, 5 Sup. Ct. 139; 508, 512, Fed. Cas. No. 13,975; *Kennedy Porter v. Sabin* (1893) 149 U. S. 480, r. *Indianapolis etc. R. Co.* (1880) 2 37 L. ed. 818, 13 Sup. Ct. 1011; *Fox v. Flipp*, 707, 3 Fed. 99; *Hickox v. Hollis*,

§ 2603. Tax Warrant Not Levyable on Property in Hands of Receiver.

Perhaps the most striking illustration of the principle in question is found in cases where attempts have been made to subject the property in the hands of a receiver to the payment of taxes. It has been contended that the lien for taxes is of such high nature that even the possession of the court ought to yield so far as to permit the property to be taken under a tax warrant. But the same principle is applied here as in all other cases where attempts are made to reach the property by independent process.⁵¹ In a leading case where this point was considered the supreme court said: "The levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."⁵²

§ 2604. Power of Trustee to Deal with Receivership Property.

The following case, decided only a few years ago, affords an interesting illustration of the operation of the principle that when property comes in the hands of a court by the appointment of a receiver, it can be reached and dealt with only through the court appointing the receiver.

Hitz v. Jenks (1902) 185 U. S. 155, 46 L. ed. 851: A deed of trust on real property with a power of sale in the trustee had been executed to secure the payment of notes. Litigation ensued between parties claiming interests in the property, and

day (1886) 12 Sawy. 214, 216, 29 Fed. 233, 234; *Malcomson v. Wappo Mills* (1898) 85 Fed. 910.

The only effect of the service of an attachment on property in the hands of a receiver is merely to notify the court, through its receiver, of the existence of the claim. *In re John L. Nelson & Bro. Co.* (1907) 149 Fed. 590, 594.

⁵¹ *Oakes v. Myers* (1895) 68 Fed. 807; *Ex parte Chamberlain* (1893) 55 Fed. 704; *Ex parte Huldeker* (1898) 55 Fed. 709; *Virginia etc. Co. v. Bristol Land Co.* (1898) 88 Fed. 134; *Ledoux v. La Bee* (1897) 83 Fed. 761; *Burleigh v. Chehalis County* (1896) 75 Fed. 873; *Johnson v. Southern etc. Assoc.* (1904) 132 Fed. 540; *King v. Wooten* (1893) 4 C. C. A. 519, 54 Fed. 612; *Clark v. McGhee* (1898) 81 C. C. A. 381, 87 Fed. 789.

⁵² *In re Tyler* (1893) 149 U. S. 164, 183, 37 L. ed. 689, 695. See also *Georgia v. Atlantic etc. R. Co.* (1879) 3 Woods 434 (levy of tax warrant on property in hand of receiver held to be void, and application for leave to proceed under the levy denied).

the trustee named in the deed was appointed receiver *pendente lite*, to manage the property and collect its rents and profits. It was held that a sale of the property made by him in his capacity as trustee while he was also receiver of the same property was ineffectual to convey a title. The fact that he was not under a prohibitive injunction not to sell was immaterial. The fact that the property was in the hands of a receiver was itself an inhibition against the sale.

Disposition of Prior Liens.

§ 2805. Conduct of Receivership Proceedings with Reference to Adverse Liens and Claims.

The circumstance that persons having an interest in or lien upon property in the hands of a receiver are effectually precluded from enforcing such right in any other court than that in which the receivership proceedings are pending imposes on that court the equitable obligation so to conduct the receivership proceedings that all persons having any just claim upon the property may be afforded ample means of asserting the same in that suit. In conformity with this idea, courts of equity in conducting receiverships exercise great care to preserve all prior liens and incumbrances unimpaired. To this end a court of equity will adopt proper methods, by reference to a master or otherwise, to ascertain such parties and bring them before the court;⁵³ and the rights of persons having superior claims by prior mortgage or otherwise to the property will not be interfered with.⁵⁴

Furthermore, it is a rule that all persons having prior liens and incumbrances must have notice and an opportunity to come in and claim their prior right to the property or interest in the fund. If such notice and opportunity be not given, such prior liens are not in any way affected by the proceedings in that suit,⁵⁵ and they may be duly enforced in a subsequent proceeding instituted after the first court has let the property go.

The usual and proper proceeding by which a person having a lien upon property in the hands of a receiver or claiming other interest

⁵³ *In re Hall & Stilson Co.* (1895) 69 Fed. 425; *Fidelity Insurance etc. Co.* (1893) 58 Fed. 45. ⁵⁴ *Risk v. Kansas Trust & Banking Co.* 69 Fed. 425; *Fidelity Insurance etc. Co.* (1893) 58 Fed. 45. ⁵⁵ As to the effect, under a local statute, of the appointment of a receiver upon attachment and execution liens, see *Central Trust Co. v. Worcester Cycle Mfg. Co.* (1902) 114 Fed. 650. *Vance v. Royal Clay Mfg. Co.* (1897) 82 Fed. 251; *Moore v. Southern States etc. Co.* (1896) 83 Fed. 399; *McRae v. Bowers Dredging Co.* (1898) 86 Fed. 344; *Central Trust Co. v. Worcester Cycle Co.* (1902) 114 Fed. 659, 665. See *Cohen v. Gold Creek etc. Co.* (1899) 95 Fed. 590. ⁵⁵ *Wiswall v. Sampson* (1852) 14 How. 67, 14 L. ed. 328.

in it may assert the same is the intervention *pro interesse suo*, where the claimant or lienholder is not already a party to the suit. The nature of this proceeding has been elsewhere described.⁵⁶

§ 2606. Court's Control over Liens Claimed by Outsiders.

In dealing with liens on property in the hands of a receiver and other interests in the same asserted by any person, the court has plenary power to control, manage, and dispose of such liens and interests in such way as, while protecting the claimant or lienholder, will enable the court to realize most out of the property for the benefit of all interested. The court may, for instance, require a lienholder to execute a release of his lien in order that the property may be sold free from the incumbrance, the lien being at the same time expressly transferred by the court from the property so released to the proceeds to be realized from the sale.⁵⁷

§ 2607. Practice as to Satisfaction of Prior Liens.

Whether a court appointing a receiver should undertake to adjudicate all liens on the property and provide for their satisfaction depends on the circumstances of the case. The plain duty of the court in this matter is to preserve the essential rights of the parties. If it appears that the receivership can be conducted to a conclusion and the receiver discharged without prejudice to any liens that may exist on the property, the court in such case may, if it prefers, pass over the matter of the liens and leave the parties to work out their rights in some other proceeding as they may be advised; but if there is danger that the lienors may lose their rights unless they are protected in some order made by the court, such order should be made; or some other course should be followed which the circumstances suggest as suited to the particular exigency.⁵⁸

§ 2608. When Lienor Permitted to Enforce Lien Directly.

Though undoubtedly a court of equity may, upon proper application, permit a creditor having a superior lien to proceed directly to the enforcement of his lien, such proceedings on behalf of the prior incumbrancer should always be under the control of the court. Thus if the property in dispute is ample and the litigation promises to be

⁵⁶ See *ante*, §§ 1364-1388.

⁵⁷ *De Visser v. Blackstone* (1868) 6 American Trust Co. (C. C. A.; 1905) 68 Blatchf. 235, Fed. Cas. No. 3,840. ⁵⁸ Commonwealth Roofing Co. v. North C. C. A. 418, 135 Fed. 984.

protracted, a prior judgment creditor might be permitted to have execution issued, and then the court could require the party prosecuting the receivership proceedings to pay off the claim. But any actual sale under the execution would apparently not be permitted in any case.⁵⁹

A party who desires to get permission of a federal court to levy an execution from another court on property in the hands of its receiver should give notice of his motion or petition not only to the receiver but to all parties in interest, as for instance, to a claimant of the property who is a party to the original suit.⁶⁰

§ 2609. Enforcing Mechanic's Lien on Receivership Property.

One who has a mechanic's lien on property going into the hands of a receiver need not go to the trouble of actually attaching for the purpose of enforcing his lien. In order to effectuate the lien by attachment he would first have to go into court and ask for leave to proceed in that way; and the better procedure is for him to intervene at once by petition and ask the court to adjudicate the lien and charge the property with it. This the court has abundant authority to do, without resorting to any process of attachment. The appointment of the receiver fixes the rights of all the parties and gives the court full power to determine the true interests of all concerned.⁶¹

§ 2610. Order for Surrender of Property to Claimant.

Where a stranger intervenes and makes a sufficient showing of title in himself, the court will usually order the receiver to surrender the property to the claimant. An interlocutory order directing the receiver to turn over property to a particular person does not constitute a binding adjudication of title or a final determination of the right to possession.⁶²

The speedy surrender of property held by a receiver to those who may appear to be entitled to its control and custody is always desirable, and the courts are usually anxious to be relieved of the responsibility incident to the continuance of the receivership. Accordingly it is not unusual for the court to order the receiver to surrender the property before the final settlement, the party receiving the property

⁵⁹ *Hitz v. Jenks* (1902) 185 U. S. 166, ⁶¹ *Commonwealth Roofing Co. v. North*

46 L. ed. 855; *Wiswall v. Sampson American Trust Co.* (C. C. A.; 1906) 68

(1852) 14 How. 68, 14 L. ed. 329. ⁶² *C. C. A. 418, 135 Fed. 984.*

⁶⁰ *In re Hall & Stilson Co.* (1895) 69 ⁶² *Marshall v. Otto* (1893) 59 Fed.

Fed. 425, 249.

giving sufficient security to abide by any decree that may be entered against the estate. The authority of the receiver in respect to defending against claims made to the property is usually in such case continued, notwithstanding the surrender of the property.⁶³

§ 2611. Formalities Incident to Compliance with Such Order.

If a court orders that property in the hands of a receiver shall be turned over to a particular individual upon demand made by him of the receiver, such person should accompany his demand by presenting a certified copy of the order and should signify his willingness to execute a receipt for the property. The copy of the order and the receipt are then filed by the receiver with the papers and constitute a voucher showing the performance of the order.⁶⁴

§ 2612. Reimbursement of Fund or Property Appropriated by Receiver.

An individual whose money or property has been wrongfully appropriated by a receiver and applied to the purposes of the trust may be reimbursed out of any funds belonging to the trust and remaining in the receiver's hands. The circumstance that a distribution of the particular money has been made does not destroy the equitable right of such person to charge the whole fund,⁶⁵ provided the circumstances are such as to make out, upon general equitable principles, a case for following such money into the trust fund.⁶⁶

⁶³ *Bosworth v. St. Louis Terminal etc. C. A.; 1896) 74 Fed. 395, 20 C. C. A. Asso.* (1899) 174 U. S. 189, 43 L. ed. 943. 468, 33 L.R.A. 739.

⁶⁴ *Very v. Watkins* (1859) 23 How. ⁶⁶ *Terre Haute etc. Co. v. Cox* (C. C. 469, 16 L. ed. 522. A.; 1900) 102 Fed. 825, 42 C. C. A. 654.

⁶⁵ *Standard Oil Co. v. Hawkins* (C.

CHAPTER LXIII.

RECEIVERS (*continued*).

Court's Control over Receiver.

- § 2613. To What Court Receiver Responsible.
- 2614. Supervisory Authority of Court.
- 2615. Order of General Instructions—Application for Specific Directions.
- 2616. Who May Obtain Order for Guidance of Receiver.
- 2617. Informal Instructions—When Formal Motion Proper.
- 2618. Discretion of Receiver in Carrying Out General Instructions.
- 2619. Petition of Employees in Respect to Relations with Receiver.
- 2620. Formal Pleadings Unnecessary in Such Proceeding.
- 2621. Review of Receiver's Discretion as to Scale of Wages.
- 2622. Receiver Required to Give Notice of Cut in Wages.
- 2623. Discretion of Receiver as to Continuation of Prior Regulations.
- 2624. Relations of Receiver and Employees Generally—Gratuitous Assistance to Employee.

Authority of Receiver.

- 2625. Court as Source of Receiver's Authority.
- 2626. Assumption of Personal Liability by Receiver.
- 2627. Order Defining Extent of Receiver's Powers.
- 2628. Division of Authority between Co-receivers.
- 2629. Incidental and Implied Powers of Receivers.
- 2630. Authority of Receiver to Employ Help and Appoint Agents.
- 2631. Implied Authority to Employ Counsel.
- 2632. Who May Be Employed as Legal Adviser.
- 2633. Right of Receiver to Discharge Counsel.
- 2634. Receiver's Authority to Make New Executory Contract.
- 2635. Ratification by Court to Unauthorized Act of Receiver.
- 2636. Want of Authority in Receiver Not Available to Other Party.
- 2637. Lease Executed by Authority of Court—Compensation to Lessee for Breach.
- 2638. Form of Order Authorizing Lease.

Disposition of Existing Contracts.

- 2639. Receiver Not Bound by Prior Executory Contract.
- 2640. Consequences of This Doctrine.
- 2641. Discretion of Court as to Adoption of Contract—Adoption by Receiver.
- 2642. Petition for Order of Specific Performance.
- 2643. Considerations Affecting Discretion of Court as to Granting Order for Specific Performance by Receiver.
- 2644. Claim for Prior Breach of Contract or Tort—Prior Judgment.

Disposition of Existing Leases.

- § 2645. Receiver Not Liable as Lessee of Prior Lease.
- 2646. How Receiver May Become Liable as Lessee.
- 2647. Right of Receiver to Take Possession of Leasehold.
- 2648. Reasonable Time for Adoption or Rejection of Lease.
- 2649. Implied Adoption of Lease from Retention of Premises.
- 2650. Possession of Premises as Affecting Adoption of Lease.
- 2651. Injunction to Enforce Specific Performance of Lease Pendente Lite.

Receivership Sale.

- 2652. Sale of Receivership Property—When Sale Complete.
- 2653. Receiver Holding as Agent of Purchaser.
- 2654. Title of Purchaser as Affected by Irregularities in Sale.
- 2655. Deed to Purchaser.
- 2656. Reservation of Right to Charge Property in Hands of Purchaser.
- 2657. Estoppel of Purchaser to Question Lien.

*Court's Control over Receiver.***§ 2613. To What Court Receiver Responsible.**

As the receiver is directly responsible to the court of appointment, he is accountable in such manner, or to such persons, as the court may direct; but he is not responsible as receiver to any other court than that from which he derives his authority.¹ However, a receiver appointed by a state court may be held accountable by a federal court when the cause is removed to the latter court from the state court.²

§ 2614. Supervisory Authority of Court.

As officer and agent of the court by which he was appointed, the receiver is at all times subject to its control. Deriving his existence from the court whose creature he is, the receiver is subject at every step to the supervision of that court in all matters pertaining to the management of the property or funds placed in his charge.³ If a receiver proposes to remove the property or the fund that he is administering from the jurisdiction, the court may restrain him from so doing until an adjudication is had on the merits of a claim of ownership or lien asserted by an intervening petitioner.⁴

¹ Conkling v. Butler (1865) 4 Biss. Kansas Pac. R. Co. (1878) 5 Dill. 479; 22; Bill v. New Albany R. Co. (1870) 2 Green v. Hanberry (1830) 2 Brock. 419. Biss. 390.

² Hinckley v. Gilman etc. R. Co. (1879) *Court May Compel Discontinuance* of Nuisance by its receiver. Felton v. 100 U. S. 153, 25 L. ed. 591.

³ Booth v. Clark (1854) 17 How. 331, 9 C. C. A. 457. Ackerman (C. C. A.; 1894) 61 Fed. 225, 15 L. ed. 167; Davis v. Gray (1872) 16 Wall. 218, 21 L. ed. 452; Chambers v. 153 Fed. 882, 82 C. C. A. 628; (1906) 149 McDougal (1890) 42 Fed. 694; Meier v. Fed. 200, 79 C. C. A. 158.

⁴ American Can Co. v. Williams (1907) 149 Fed. 882, 82 C. C. A. 628; (1906) 149

§ 2615. Order of General Instructions—Application for Specific Directions.

General instructions as to the manner in which the receiver shall proceed in performing his official duties are commonly inserted in the order appointing him; and he is also entitled to the advice of the court in particular exigencies that arise in the course of the administration of the trust. The receiver should take care to apply for particular instruction upon all important matters not covered by the order of appointment. The receiver is not to manage the property committed to his charge as if it were his private property. It is his duty to administer the receivership as a trust, under the authority and guidance of the court. If the receiver incurs unadvised and unnecessary obligations, it is at his own risk.⁵

The court exercises control over its receiver by means of orders entered in the particular case and not through orders spread generally on the minutes.⁶

§ 2616. Who May Obtain Order for Guidance of Receiver.

Orders for the control of a receiver may be obtained not only upon his own application, but upon the application of any party to the cause, or even of persons who are not parties, provided they are in a position to be injured or affected by the course that the receiver may adopt.⁷

§ 2617. Informal Instructions—When Formal Motion Proper.

The matters about which a receiver may find occasion to seek the instructions of the court are of great variety and vary from questions of small detail to questions of great moment. In small matters the advice of the judge may be informally sought on *ex parte* application in open court or even at chambers; but where adverse rights are concerned or the matter is one of much moment, it is desirable that notice should be given to any parties interested in the right disposition of the matter. In regard to the conclusiveness and value of the advice and suggestions of the court, it has been observed that if there are

⁵ *Braman v. Farmers' Loan & Trust Co.* (C. C. A.; 1902) 114 Fed. 18, 51 C. Louis etc. R. Co. (1894) 59 Fed. 514 C. A. 644 (holding that the renting of (where employees of a receiver applied an office without the sanction of a pre- to the court for an order to prevent the vious order from the court was im- receiver from reducing wages.) proper.)

⁶ *In re Hall v. Stilson* (1895) 69 Fed. 425, 427.

parties in adverse interest, and they have their day in court, the advice of the court may be decisive; but if the application is *ex parte*, the advice is binding only on the receiver, as the judge may afterwards change his mind on hearing full argument.⁸

§ 2618. Discretion of Receiver in Carrying out General Instructions.

Though the receiver is at all times subject to the orders and directions of the court of his appointment, yet the instructions given to him are frequently of a general character, and the *minutiae* of his business are confided in a large degree to his discretion. Receivers are usually appointed because of their fitness for the particular trust reposed in them, and consequently the court does not readily undertake to control the receiver as to the matters properly confided to his discretion. This is particularly true of receiverships involving the management of large and complicated enterprises.⁹ If the court appointing a receiver were to undertake to meddle in everything and to determine every matter that might arise, the conduct of receiverships would become cumbersome and expensive indeed. The propriety of a court's refusal to interfere as to details in the receiver's management of his trust is much stronger, of course, where any investigation of that matter by the court would be tedious or otherwise impracticable.

§ 2619. Petition of Employees in Respect to Relations with Receiver.

The practice by which the employees of receivers are permitted to apply to the court for relief from any substantial grievance suffered by them at his hands under the authority of the court or independent of such authority is well established, especially in connection with railroad receiverships.¹⁰ When such an application is made by or on behalf of the employees, it becomes the duty of the court to consider the same; and if the allegations are of a character to make it proper to consider them further, the receiver should be required to file an answer. The court will then be able to determine from the applica-

⁸ Missouri Pac. R. Co. v. Texas etc. note; Continental Trust Co. v. Toledo, St. L. etc. R. Co. (1894) 59 Fed. 514.

⁹ Continental Trust Co. v. Toledo etc. In Booth v. Brown (1894) 62 Fed. 794, R. Co. (1894) 59 Fed. 514, 518.

¹⁰ Frank v. Railway Co. (1885) 23 a petition presented in behalf of ex-Fed. 757; *In re Doolittle* (1885) 23 Fed. employees, who had quit the employment 544, 548; Waterhouse v. Comer (1893) of the receiver on the occasion of a 55 Fed. 149, 19 L.R.A. 403; Farmers' strike and wished to be reinstated in Loan etc. Co. v. Northern Pac. R. Co. their jobs. (1894) 60 Fed. 803, 818, 25 L.R.A. 414,

tion and answer whether the issue between the receiver and his employees is of such character as to require a formal investigation, either by reference to a master or by hearing witnesses in open court.¹¹

§ 2620. Formal Pleadings Unnecessary in Such Proceeding.

The strict rules of equity pleading are not insisted upon in these proceedings. In a case where a petition on behalf of employees against the receiver appeared not to be prosecuted by any proper person in interest, the court, instead of dismissing the petition peremptorily, allowed others to come in who were entitled to present the application. Indeed the court may, of its own authority and because of the peculiar relation of trust existing between it and the receiver and between it and the employees of the receiver, consider an application or petition preferred on behalf of the employees, though it is informally presented and is not prosecuted by a proper person. But of course the court will not ordinarily undertake to investigate the conduct of its receiver and to admonish or restrain him at the instance of any litigious busybody. It would be mischievous indeed if a receiver were required to answer with respect to his official acts at the suit of a mere meddler.¹²

§ 2621. Review of Receiver's Discretion as to Scale of Wages.

In a number of instances the courts have been called upon to pass on disputes between receivers and employees in regard to the terms of their employment or the wages to be paid. These are matters that are primarily committed to the discretion of the receiver; and the courts are inclined to overrule him only in a clear case of a mistaken use of his power.¹³ His decision is ordinarily treated as final, unless palpable wrong and injustice is being done. But notwithstanding the courts have sometimes laid great weight on the fact that the receiver's discretion in adjusting his relations with his employees is subject to review only in case of an abuse in that discretion, it must be considered that after all the matter is properly one for the court to pass on; and if the court considers the reduction reasonable, and it appears to be necessary, the receiver will be authorized to take such action, but if it does not appear to be necessary or reasonable, the court will not allow the scale of wages to be reduced. The mere circumstance that

¹¹ *Continental Trust Co. v. Toledo etc. R. Co.* (1894) 59 Fed. 514.

¹² *Platt v. Philadelphia etc. R. Co.* (1894) 65 Fed. 872.

¹³ *Booth v. Brown* (1894) 62 Fed. 794.

sufficient help can be had at lower rates than the prevailing scale does not alone justify a reduction in wages. The retention of faithful, intelligent, and capable employees is greatly more important than the item of economy.¹⁴

A receiver will not be permitted to renounce the schedule of wages agreed upon between the corporation and its employees and to fix a new and lower scale, at the same time retaining the employees and asking the court to direct them to conform to such scale. The receiver cannot at the same time claim the benefit of a contract and renounce its burden. To insist upon performance by the other party impliedly operates as an adoption of the contract. If the receiver wishes to escape from the obligation he must indicate a willingness to absolve the other party from his part.¹⁵

1. *Thomas v. Cincinnati etc. R. Co.* (1894) 62 Fed. 17: In refusing, upon a petition of the employees, to set aside an order of receiver making a ten per cent. cut in wages, the court directed attention to the attitude taken by it on such questions in the following words: "The court cannot and does not undertake to operate a railroad itself. It appoints, as its agent to do so, a man of well-known professional skill and experience as a railroad manager. In his judgment, the court must necessarily repose a confidence, commensurate with the large interests intrusted to his care. Hearings of this kind may be had, and, if the receiver has made a manifest error or committed an abuse of the discretion intrusted to him, the court will correct it. But the burden of showing either must, in the nature of things, be upon the petitioner."

2. *Ames v. Union Pac. R. Co.* (1894) 60 Fed. 674, 62 Fed. 7: Where the receiver before promulgating a revision and rearrangement of the rules, schedules, and wages of his nonsalaried employees asked the court to sustain him and also prayed that the employees be directed to refrain from conspiring with intent to induce a strike, the court came to the conclusion, upon the showing made to it, that it was to the interest of all concerned for the same scale of wages to prevail as before the receivership proceedings were instituted and that the same regulations should be likewise continued without change. Accordingly the contemplated changes were not sanctioned, though the receiver stated that the employees were receiving higher wages than were paid on other railroads in that region. In refusing to adopt the schedule of wages proposed by the receiver the court observed: "When the schedule of wages in force at the time the court assumes the management of the road is the result of a mutual agreement between the company and the employees, which has been in force for years, the court will presume the schedule is reasonable and just, and any one disputing that presumption will be required to overthrow it by satisfactory proof."¹⁶

¹⁴ *United States Trust Co. v. Omaha etc. R. Co.* (1894) 63 Fed. 737.

¹⁵ *Ames v. Union Pac. R. Co.* (1894) 62 Fed. 7, 13.

¹⁶ *Ames v. Union Pac. R. Co.* (1894) 62 Fed. 12.

§ 2622. Receiver Required to Give Notice of Cut in Wages.

As the re-adjustment of the scale of wages of the employees of a railroad receiver involves a grave responsibility, it has been considered reasonable to require a receiver who contemplates a reduction of wages to give due notice of the proposed change, so that the employees may have a chance to be heard. If, after conferring together, the receiver and the employees are not able to agree upon the proper step to be taken, the matter should then be referred to the court.¹⁷

§ 2623. Discretion of Receiver as to Continuation of Prior Regulations.

A receiver may be upheld in continuing a regulation long enforced by the company prior to the receivership, which regulation has worked well, though the court might consider such regulation to be of such doubtful policy as not to justify putting it into effect if it had not previously been in force. The question whether the receiver should continue a prior regulation is different from the question whether it should be adopted as a new rule.¹⁸

§ 2624. Relations of Receiver and Employees Generally—Gratuitous Assistance to Employee.

In his relations to his employees the receiver should adopt a just and liberal policy such as is adopted by well-managed concerns in private hands. In exceptional cases gratuitous assistance can be given to a faithful employee, but this should, of course, be done only under the protection of an order of the court. The receiver, it has been said, should be required to act towards his employees as would other persons of ordinary humanity and right feeling under similar circumstances.

Freundlich's Case (1886), noted in *Missouri etc. R. Co. v. Bradford* (1888) 33 Fed. 701: One Freundlich, an employee of a railroad receiver, was accidentally hurt while in the discharge of his duty, without contributory negligence on his part but under such circumstances that the receiver was not liable. The court directed the receiver to pay him his wages during the time he was disabled from

¹⁷ *Ames v. Union Pac. R. Co.* (1894) was appointed, no revision of the scale 60 Fed. 674 (1894) 62 Fed. 7; United of wages could be made except upon States Trust Co. v. Omaha etc R. Co. notice and a conference between the (1894) 63 Fed. 737. (But in the par- officers of the road and its employees.)
ticular case where this rule was first ¹⁸ *Platt v. Philadelphia etc. R. Co.* announced it appeared that under agree- (1894) 65 Fed. 665.
ments in force at the time the receiver

work, observing that it was not only equity and good conscience but good railway management that in such cases wages should not be stopped during convalescence.

The principle here enunciated has been approved by other judges in several instances. It will, however, be applied only where the servant has not shown himself negligent or unfaithful.¹⁹

Authority of Receiver.

§ 2625. Court as Source of Receiver's Authority.

In regard to the extent of the authority of a receiver it may be said generally that he has such power as is conferred upon him expressly or by necessary implication and none other. In what are called statutory receiverships, the power and the authority of the receiver is defined to a greater or less extent by the terms of the statute under which the receivership is created; but in all ordinary receiverships instituted by the court of equity in conformity with its usual practice, the authority of the receiver is derived exclusively from the court, and the receiver has only such powers as the court deems proper to confer on him.²⁰

§ 2626. Assumption of Personal Liability by Receiver.

The receiver can of course always make himself personally liable on contracts made by him in the management of the receivership. Whether he does in a particular case assume personal responsibility is to be determined upon the facts.²¹

§ 2627. Order Defining Extent of Receiver's Powers.

It is customary in the order of appointment to define the duties and powers of the receiver quite fully. Such order supplies the chart by which the receiver is to be guided, and the limits of the powers therein granted must not be exceeded by him. Of course it is not necessary that every little thing that the receiver is to be allowed to

¹⁹ Missouri Pac. R. Co. v. Texas etc. the state has a lien, appointed by the R. Co. (1890) 41 Fed. 319; Thomas v. governor in conformity with a statute, East Tenn. etc. R. Co. (1894) 60 Fed. 7. may, under such statute, exercise a pow-

²⁰ Quincy etc. R. Co. v. Humphreys er and authority somewhat greater than (1892) 145 U. S. 82, 36 L. ed. 632; Union that which it would be permissible for Bank v. Kansas City Bank (1890) 136 an ordinary receiver appointed by a U. S. 223, 34 L. ed. 341; Thompson v. court of equity to exercise. Lafayette Phenix Ins. Co. (1890) 136 U. S. 287, 34 Co. v. Neely (1884) 21 Fed. 738. L. ed. 408; Booth v. Clark (1854) 17 ²¹ Cake v. Mohun (1896) 164 U. S. How. 322, 15 L. ed. 164. 311, 41 L. ed. 447.

The receiver of a railroad on which

do should be expressly enumerated; but it is necessary that authority for any particular course should be found in the order of appointment, or should be deducible from it by necessary implication. And where an unusual or extraordinary power is claimed for the receiver, the existence of it should be clearly made out either from the order of appointment or some subsequent order of the court. It has been observed that the progress of the law in regard to receivers has been uniformly marked by the conferring of larger powers on them.²²

§ 2628. Division of Authority between Co-receivers.

If two or more receivers of a railroad are appointed who reside at considerable distances from one another, and by an arrangement among themselves one is constituted a managing receiver, his authority will have a broader scope than it otherwise would have, approximating somewhat to that of a sole receiver. And in all local matters of minor importance one of the receivers so situated will be allowed to bind the receivership where any occasion arises which requires his attention. The absence and inaccessibility of the other receivers creates an agency of necessity.²³

§ 2629. Incidental and Implied Powers of Receivers.

A receiver has, by implication, authority to take any steps or do any act necessary to accomplish the end or purpose that he is directed to accomplish. Receivers necessarily have a considerable amount of discretionary power in the management and control of property intrusted to their care. The extent of the implied powers of the receiver and the extent of his discretion depend largely upon the nature of the receivership. It is obvious that the duties and powers of a managing receiver must be very much larger and more extensive than those of a receiver who is merely appointed to receive and hold assets. Where a receiver is appointed to manage and conduct a business, many of its details must of necessity be left to his judgment, for it would be impracticable to apply to the court for specific instructions in every instance.²⁴

²² Davis *v.* Gray (1872) 16 Wall. 219, equity. The Clara A. McIntyre (1899) 21 L. ed. 452. ²³ Girard Ins. Co. etc. *v.* Cooper (1896) 94 Fed. 552.

Apparently a receiver has no authority to execute an assignment of a chose in action without an order of court to that effect. And a person who takes under his assignment, made without such leave, gets no title that is enforceable in ²⁴ Continental Trust Co. *v.* Toledo etc. R. Co. (1894) 59 Fed. 514; New York etc. R. Co. *v.* New York etc. Co. (1893) 58 Fed. 268.

A receiver of a railroad who is directed to continue the operation of the road has the same power to make special contracts with particular individuals for the transportation of freight or passengers as the officers of the company ordinarily have. Indeed it would be in the highest degree disadvantageous to all interested, if this were not so.²⁵ A receiver who is given authority to manage and carry on a private business enterprise has implied authority to incur obligations for supplies and materials.²⁶

§ 2630. Authority of Receiver to Employ Help and Appoint Agents.

A receiver charged with duties that it is impracticable for him to do in person has implied authority to employ help.²⁷ The receiver of a railroad who is directed to conduct and continue the business of the company has the same power to appoint agents, general or special, that the official head of the corporation had before the receiver was appointed.²⁸

Ratification by a receiver, or those competent to represent him, of a contract made on behalf of the receiver by an unauthorized agent is equivalent to a prior grant of authority.²⁹

§ 2631. Implied Authority to Employ Counsel.

A receiver has a right to employ counsel to advise him in the management of the property placed in his hands, and it is his duty to do so whenever legal advice or legal service is required.³⁰ Having authority to employ counsel in the first instance, he of course has authority to continue the employment of counsel in suits instituted prior to his appointment, where the prosecution of such suits looks to the protection of the trust property.³¹

§ 2632. Who May Be Employed as Legal Adviser.

Although the receiver is himself a lawyer, it may be proper for him to employ other legal counsel. In a case where this course was

²⁵ Northern Pac. R. Co. v. American Trading Co. (1904) 195 U. S. 461, 49 L. ed. 279; *affirming* Farmers' Loan & Trust Co. v. Northern Pacific R. Co. (1903) 120 Fed. 873, 57 C. C. A. 533. ²⁶ Elk Fork Oil etc. Co. v. Foster (C. 1900) 99 Fed. 495, 39 C. C. A. 615; *Platt v. Archer* (1876) 13 Blatchf. 311, 17 Sup. Ct. 100, 41 L. ed. 447. ²⁷ Gunn v. Ewan (C. C. A.; 1899) 93 Fed. 80, 35 C. C. A. 213. ²⁸ Northern Pac. R. Co. v. American Trading Co. (1904) 195 U. S. 462, 49 L. ed. 279; ²⁹ Northern Pac. R. Co. v. American Trading Co. (1904) 195 U. S. 462, 49 L. ed. 279. ³⁰ *Cake v. Mohun* (1896) 164 U. S. 311, 17 Sup. Ct. 100, 41 L. ed. 447. ³¹ *G. A.; 1900* 99 Fed. 495, 39 C. C. A. 615; *Platt v. Archer* (1876) 13 Blatchf. 351; *Cowdrey v. Galveston etc. R. Co.* (1870) 1 Woods, 331. ³² *Sowles v. Nat. Union Bank* (1897) 82 Fed. 139.

sanctioned, the court approved the employment by the receiver of his own law partner.³² Ordinarily the attorney for the plaintiff in a bill under which a receiver is appointed should not be appointed attorney for the receiver.³³

§ 2633. Right of Receiver to Discharge Counsel.

A receiver may discharge counsel and substitute another in his stead. The court will not insist on the retention of counsel who is in disfavor with the receiver. But arrangement must be made to compensate the counsel who is discharged for such work as he has already done. If the business for which particular counsel was retained is practically finished, an order to discharge him and substitute another will not be allowed.³⁴

§ 2634. Receiver's Authority to Make New Executory Contract.

The receiver is not a general agent of the court such as would possess implied general authority to make executory contracts binding on the receivership. He has no authority to bind the trust by contract unless it is expressly conferred or the contract is approved and ratified by the court. This rule applies with peculiar force to contracts involving large expenditures and extending beyond the life of the receivership. Until such unauthorized contracts are confirmed and ratified, the court is at liberty to deal with them as to it may appear just. It may modify them or set them aside entirely. It follows that all persons dealing with receivers do so at their peril, and they are bound to take notice of the incapacity of the receiver to conclude a binding contract without the sanction of the court. Though a receiver may enter into negotiations and make agreements that would be fully binding on him if he were acting in an individual capacity, yet before the funds in his hands can be affected, the court must give its consent and sanction.³⁵

1. *Chicago Deposit Vault Co. v. McNulta* (1894) 153 U. S. 554, 38 L. ed. 819, 14 Sup. Ct. 915: The order appointing a railroad receiver authorized him, subject to

³² *Gunn v. Ewan* (C. C. A.; 1899) 93 Fed. 80, 35 C. C. A. 213. to speak, by the receiver to act as his counsel. *Blair v. St. Louis etc. R. Co.* (1884) 20 Fed. 348.

In one instance the court refused to sanction the appointment of a particular lawyer as attorney and counsel for a receiver where it appeared that such attorney was a kinsman of the receiver and was a member of the bar of a different state, having been imported, so ³³ *Blair v. St. Louis etc. R. Co.* (1884) 20 Fed. 348. ³⁴ *In re Herman* (1892) 50 Fed. 517. ³⁵ *Smith v. McCullough* (1881) 104 U. S. 25, 26 L. ed. 637.

the supervision of the court, to make all contracts that might be necessary in carrying on the business of the road. For the purpose of conducting the receivership business, the receiver found it necessary to have a suite of rooms, and to that end leased such rooms for a period of more than four years, at an annual rental of about ten thousand dollars. The contract of lease was not reported to or confirmed by the court, but in the receiver's reports the items of monthly rent for these offices were entered, under the heading of "operating expenses," as "rent of general offices." The receivership was terminated before the lease expired, and the receiver then surrendered the offices and gave notice that he would not be bound by the lease. However, the rent was paid for all the time the rooms were actually occupied. The lessor insisted that the receiver was bound by the contract. But it was held to the contrary. The order of the court appointing the receiver was not broad enough to authorize the lease, and the act of the court in allowing the monthly items of rent was not a confirmation of the contract, of the existence of which, indeed, the court was ignorant.

In discussing the authority of a receiver to make contracts involving large outlays and extending beyond the life of the receivership, the supreme court said: "It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liabilities for supplies, material, or labor needed in the daily administration of railroad property committed to his care as an officer of the court; but it seems equally well settled that the courts decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays or contracts extending beyond the receivership, and intended to be binding upon the trust. The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities—like the one in question—must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust." The court added, however, that where a contract entered into by a receiver has been completely performed and the claim is for compensation only, equitable relief may well be granted, though the contract was originally unauthorized and the court has never ratified it.

2. *Coudrey v. Galveston, Houston etc. Railroad*, (1876) 93 U. S. 352, 23 L. ed. 950: It was held that a receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with the one in his hands, were properly disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge.

3. *Union Trust Co. v. Illinois Midland Co.* (1886) 117 U. S. 434, 479, 29 L. ed. 963, 978: Debts for considerable sums of money, borrowed by the receiver without previous authority from the court, were not allowed any priority out of the trust fund, though the moneys borrowed were applied to pay expenses of the receivership, such as supplies, repairs, and pay-rolls, and to replace moneys that had been so applied, for the reason that no order of the court had been obtained to borrow funds for those purposes.

§ 2635. Ratification by Court of Unauthorized Act of Receiver.

Though a receiver should, as a rule, take no step in the conduct of his trust without the general or special authority, express or implied, of the court of his appointment, yet where the receiver acts *bona fide* without such antecedent authority, and the act redounds to the benefit of the estate in his hands, it will usually be ratified and approved by the court. A decree confirming an act done by the receiver is equivalent to previous authority and direction.⁸⁶

§ 2636. Want of Authority in Receiver Not Available to Other Party.

Want of antecedent authority in the receiver to transfer property or make a contract does not necessarily so far invalidate the transaction as to enable the other party to set up the want of authority, especially where the act or transaction is such that the court might properly have authorized it in the first instance; and such a transaction is always made good by the subsequent approval of the court.⁸⁷

Thompson v. Phenix Ins. Co. (1890) 130 U. S. 287, 34 L. ed. 408: One Kearney, as receiver of a hotel, took out insurance on it. The insurance company knew that he had no personal interest in the property and acted entirely in a representative capacity. As a defense to the policy, the company set up that the receiver had not been authorized to take out such insurance. This contention was overruled, the court saying: "Whether Kearney exceeded his authority, or rightly applied the funds in his hands, are questions in which no one is concerned, except himself, the court to which he was amenable, and the parties interested in the property in his charge. If he was not, technically, authorized to use the funds in his hands to pay for insurance, still, upon the settlement of his accounts, if he acted in good faith, the court might allow him any sums paid out for that purpose. He held such relations to, and was under such personal responsibility for the safety of the property, that he could make a valid contract of insurance, although his use of the funds in his hands for that purpose was subject to the approval of the court."

§ 2637. Lease Executed by Authority of Court—Compensation to Lessee for Breach.

If a receiver, acting under the authority of the court, demises property held by him as receiver, the lease is valid to the same extent as any other contract made between private persons;⁸⁸ and if the

⁸⁶ *Richter v. Halliday* (C. C. A.; C. C. A.; 1902) 114 Fed. 14, 51 C. C. A. 1901) 112 Fed. 86, 50 C. C. A. 183. 640. See *Vault Co. v. McNulta* (1894)

⁸⁷ *Manufacturing Co. v. Bradley* 153 U. S. 554, 560, 14 Sup. Ct. 915, 38 (1881) 106 U. S. 175, 26 L. ed. 1034. L. ed. 819, 821. The consent of the mort-

⁸⁸ *Farmers' Loan & Trust Co. v. Eaton* gage bondholders is not essential to the Eq. Prac. Vol. II.—96.

receiver sees fit to violate the lease or the court finds it necessary to authorize a breach of its terms, as by turning the lessee out, the lessee is entitled to damages, and the court will assess the proper damages in the receivership proceeding. In a case where it was insisted that the lessee was not entitled to damages where the lease was terminated without the consent of the lessee, it was said that courts ought to be even more scrupulous in keeping their engagements or in awarding damages for injury done by them or by their agent than in enforcing the engagements of others.³⁹ A judicial tribunal, as has been observed by Judge Brewer, should be chary of its promises but eager of performance.⁴⁰

Where the court authorizes a receiver appointed in a foreclosure proceeding, to lease the property held by him, the lease made in pursuance of such order is binding on the mortgagee though he is not a formal party to the suit.⁴¹

§ 2638. Form of Order Authorizing Lease.

Where the court authorizes a lease of receivership property to be made, the order directing such step should expressly reserve an authority to terminate the lease; and the same provision should be inserted in the lease itself. If this is not done, and the property is leased for a fixed term, the lessee, upon being ousted by an order of the court before the termination of the lease, is entitled to damages for the breach of the contract.⁴²

Disposition of Existing Contracts.

§ 2639. Receiver Not Bound by Prior Executory Contract.

In the conduct of receivership causes important questions not infrequently arise in regard to the duty of the receiver with respect to the performance of contracts entered into before his appointment by the person or corporation over whose property the receivership extends. Superficially it might appear that the receiver should be held bound by the executory contracts of the person whose property

making of a valid lease by the receiver ton etc. R. Co. (1887) 32 Fed. 805, of a railroad. Mercantile Trust Co. v. 808.

Missouri etc. R. Co. (1889) 41 Fed. 8, 11. 41 Western Union Tel. Co. v. Boston

³⁹ Farmers' Loan & Trust Co. v. Eaton Safe Deposit Co. (1901) 112 Fed. 38. (C. C. A.; 1902) 114 Fed. 14, 16, 51 C. 41 Farmers' Loan etc. Co. v. Eaton C. A. 640. (C. C. A.; 1902) 114 Fed. 14, 17, 51 C.

⁴⁰ Farmers' Loan etc. Co. v. Burling. C. A. 640.

he has taken into custody, and that he ought to be held ~~bound~~^{to} to the performance of all existing obligations. But it should be remembered that the receiver is not in privity with such person. He is not in the position of an assignee, but he is the representative of the court. It is obvious that when the court takes possession of an estate, the duty is imposed on it of administering the trust with an equal regard for the rights of all creditors interested in the distribution of the property. Furthermore, it is obvious that if the court were to recognize the binding force of all existing obligations and were to allow its receiver to proceed with specific performance of them, the chief end of the receivership would be defeated; for in the mere act of allowing one creditor to obtain all that he is entitled to, a preference would thereby be created in his favor. This the court will not allow. The general rule therefore in regard to executory contracts is that they are not binding on the receiver, unless the court directs him to proceed with the performance of them, or unless they are of such nature as to be capable of adoption by the receiver, and he does adopt them.⁴³

The rule that the receiver is not bound by the executory contract of the person over whose estate he is placed, is applicable even though such person is not actually insolvent and though the allegation of the bill to that effect should be found to be untrue.⁴⁴ Also whether the proceeding be one to foreclose a lien or merely to manage a trust that has been abused or mismanaged.⁴⁵

§ 2840. Consequences of This Doctrine.

The practical consequences of the doctrine by which the receiver is held not to be bound by contracts entered into by his insolvent predecessor is that, when such a contract is abrogated, the claim of the person with whom the contract was made is thereby reduced to a claim for damages for the breach of the contract, and it is thus put on the same plane as that occupied by the claims of other creditors.⁴⁶

⁴³ General Electric Co. v. Whitney (1896) 20 C. C. A. 674, 74 Fed. 664; (C. C. A.; 1896) 20 C. C. A. 674, 74 Fed. Central Trust Co. v. East Tennessee 664.

Land Co. (1897) 79 Fed. 19; United Electric Securities Co. v. Louisiana Electric Light Co. (1896) 71 Fed. 615; Central Trust Co. v. Marietta etc. R. Co. (1892) 16 L.R.A. 90, 51 Fed. 15. Keeler v. Atchison etc. R. Co. (C. C. A.; 1899) 34 C. C. A. 523, 92 Fed. 545.

⁴⁴ Empire Distilling Co. v. McNulta (1897) 23 C. C. A. 415, 77 Fed. 700.

⁴⁵ General Electric Co. v. Whitney (1896) 162 U. S. 529, 40 L. ed. 1062, 16 Sup. Ct. 879, affirming (1892) 2 C. C. A. 245, 51 Fed. 332; United Electric Securities Co. v. Louisiana Electric Light Co. (1896) 71 Fed. 615.

Discretion of Court as to Adoption of Contract—Adoption by Receiver.

In determining whether to allow the performance of an executory contract, the court is controlled by the interests of all the parties concerned in the insolvent estate, and it will grant leave only when the estate in the hands of the receiver will be benefited. Where a contract creditor has a lien by virtue of which his contract is an incumbrance on the property, performance will be permitted in order to relieve the property. Where a receiver is clothed with such authority as would justify him in making a contract if it were not already in existence, he has the power to adopt a prior contract made by the person over whose estate he is made receiver; and this he may do without first obtaining leave of the court. Cases in which a receiver is entitled to adopt contracts by exercising his own right of election are commonly those where the receiver is charged with the duty of conducting or managing a continuing business. It is the duty of a receiver to refuse to adopt any executory contract that would prove so burdensome as to imperil the fund; on the other hand, he should use all reasonable efforts to carry out and perform any beneficial contract. Even when a contract has been adopted by the receiver, the court can step in and put an end to performance.⁴⁷ A receiver having power to elect whether he shall adopt a prior contract or not is entitled to a reasonable time within which to determine whether it will be to the best interest of the estate to adopt the contract.

1. *Sunflower Oil Co. v. Wilson* (1892) 142 U. S. 313, 35 L. ed. 1025: In a case where it was sought to hold a receiver liable on a conditional sale of rolling stock coupled with an unconditional undertaking by the railway to purchase, the supreme court said: "The receiver did not simply by virtue of his appointment become liable upon the covenants and agreements of the railway company. Upon taking possession of the property, he was entitled to a reasonable time to elect whether he would adopt this contract and make it his own, or whether he would insist upon the inability of the company to pay, and return the property in good order and condition, paying, of course, the stipulated rental for it so long as he used it. Of course, if he elects to take property subject to a condition, he is bound to perform the condition before he can obtain title to the property. He may, however, decline to assume this obligation, and return the property to the purchaser, upon complying with the terms of the contract with respect to such return."

2. *Central Trust Co. v. East Tennessee Land Co.* (1897) 79 Fed. 19: The petition in an intervention proceeding sought to compel a receiver to accept a conveyance under a contract for the sale of land and to pay the purchase price. Said

⁴⁷ General Electric Co. v. Whitney (C. C. A.; 1896) 74 Fed. 684, 20 C. C. A. 674.

Severna, District Judge: "This contract, when the receiver was appointed, was executory. The receiver was not bound to execute that contract, but might adopt it or not, as he should think for the best interests of the estate committed to his charge. Being in charge of an insolvent estate, he could elect whether he would execute the contract, or abide the damages resulting from its breach; and in exercising his discretion he may properly take into account the equities of the holders of other unperformed obligations of the East Tennessee Land Company. He has at no time signified his adoption of the contract, but on the contrary has resisted its enforcement. No doubt there would still be left to the vendor a claim in damages for the breach of the contract, if at the time when it went into insolvency and was transferred to the receiver, a cause of action had arisen; but this would be a claim at large, and would not be accompanied by a vendor's lien. If the petitioner in this case was proceeding for relief of that kind, it ought probably to be allowed."

A receiver who with full knowledge fails to put an end to the performance of a contract made prior to his appointment and who encourages the other party to proceed with performance will be held to the payment of the contract price for such work as is done prior to his election to terminate the contract.⁴⁸

§ 2642. Petition for Order of Specific Performance.

As the courts do not recognize the binding force of pre-existing contracts, as against the receiver, it follows that the third person with whom such a contract has been made should not go ahead and perform his part of it after a receiver has been appointed, unless leave of the court has been obtained for him to finish the contract, or unless the circumstances are such that the receiver has the power to adopt the contract and he has done so. A contractor who continues performance of a contract for the building of a house after a receiver has been appointed and after the issuance of the usual injunction against existing executory contracts cannot acquire a mechanic's lien on the property that will be valid as against the mortgage debt. Nor is it material that the party so proceeding to perform claims to have been ignorant of the existence of the receivership. A party thus desiring to insist on the performance of a contract should always intervene by petition and ask leave of court to finish the contract.⁴⁹

§ 2643. Considerations Affecting Discretion of Court as to Granting Order for Specific Performance by Receiver.

In a proceeding to compel the receiver of a railroad specifically to perform a contract made by the officials of the road prior to the

⁴⁸ Girard Life Insurance etc. Co. v. ⁴⁹ Breed v. Glasgow Inv. Co. (1899) Cooper (C. C. A.; 1892) 51 Fed. 332. 2 92 Fed. 760 C. C. A. 245.

appointment of the receiver, the court will consider not only those features of the case that would ordinarily be operative on its judicial discretion in an ordinary suit for specific performance, but it will also consider the effect of granting the relief as respects rights acquired under the receivership proceedings; and specific performance will not be granted where it would result in putting a simple contract creditor in the virtual position of a lienholder.

Southern Express Co. v. Western N. Carolina etc. R. Co. (1878) 99 U. S. 191, 25 L. ed. 319: A railroad had, for a good consideration, made a contract with the plaintiff express company whereby it agreed to transport the plaintiff's express matter and to afford it other facilities for conducting its business. The bondholders brought a suit to foreclose their mortgage on the railroad, and a receiver was appointed. The receiver refused to carry out the contract with the express company, and the latter sought to enforce specific performance. This relief was refused on the ground that the plaintiff was a simple contract creditor and to enforce the contract would fix a charge on the property prejudicial to the lienholders.

§ 2644. Claim for Prior Breach of Contract or Tort—Prior Judgment.

Where there is an existing claim against the estate in the hands of a receiver, arising from prior breach of contract or from tort, the receiver of course has no authority to satisfy such obligation. The rule is the same even though such claim may have been reduced to judgment. Nor is the rule altered by the fact that the receiver may have made a promise to satisfy the claim. The court will not allow a preference to be created in this way.⁵⁰ An order of court to the effect that a receiver shall carry out and perform existing contracts must be understood to refer to existing executory obligations, and not to obligations arising from the prior breach of an unfinished contract; and such an order will not be construed to permit the payment of unsecured claims arising from the prior breach of contract.⁵¹

⁵⁰ *Whightsel v. Felton* (1899) 95 Fed. 923. A promise by a receiver to pay a pre-existing obligation for materials furnished to an insolvent road before the appointment of the receiver does not entitle the creditor to priority. *Denniston v. Chicago, Alton etc. R. Co.* (1864) 4 Biss. 414. receiver afterwards agreed to satisfy the judgment. It was, however, held that it was not legally possible for the receiver to bind himself or his successor by such an undertaking and the claim was disallowed as a charge against the receivership. *Platt v. Philadelphia etc. R. Co.* (1902) 115 Fed. 842.

A claim against a railroad company arising prior to the appointment of a receiver was reduced to judgment. The ⁵¹ *Olyphant v. St. Louis etc. Co.* (1896) 28 Fed. 729.

*Disposition of Existing Leases.***§ 2645. Receiver Not Liable as Lessee of Prior Lease.**

In administering receivership affairs a question frequently arises as to the liability of the receiver for rents due on leases executed prior to the appointment of the receiver. The principle upon which the court here proceeds is that the receiver is not, by virtue of his appointment merely, bound by the existing contract of the person over whose estate he is appointed. He is not in the position of an assignee. He is simply a custodian for the court, and no change of title occurs when the appointment is made. His possession is not by act of the parties, for he holds under and for the court appointing him. Hence in the absence of some statute casting the title upon the receiver, or some actual assignment made by the lessee, the receiver does not become assignee of the term. Nor is there any privity of estate between the receiver and the lessor, as the appointment neither changes the title nor creates any lien on the property. The proposition that a receiver is not bound by a lease executed prior to his appointment does not imply that the lease is abrogated as between lessor and lessee, upon the appointment of a receiver, or that the receiver himself has a right to abrogate it as between lessor and lessee. All that is meant is that the lease is not in itself binding on the receiver and is not a charge upon the trust fund in his hands.⁵²

The chief results of the rule that a receiver is not bound by a prior lease are two, namely, (1) that the lessor is remitted to a claim for reasonable compensation (in determining which the contract rent is not conclusive), and (2) that in so far as the lessor is entitled to damages for the breach of the contract of lease, his claim is put on the plane of a simple contract debt and therefore is not entitled to priority.⁵³

§ 2646. How Receiver May Become Liable as Lessee.

Though the receiver is not legally bound by leases executed prior to his appointment, he may become liable to the lessor in more ways than one. He may take an actual assignment of the leasehold, or he may expressly ratify and adopt the contract, or he may impliedly make himself liable by excluding the lessor from the premises, or by using

⁵² *New York P. & O. R. Co. v. New York etc. R. Co.* (1893) 58 Fed. 268. 88, 90.

⁵³ *Carswell v. Farmers' Loan etc. Co.*

them for the purposes of the receivership; or the court itself may order that he shall accept the lease and be bound by it.⁵⁴ Moreover the lessor has the right to insist that the receiver shall make his election within a reasonable time whether he will adopt the lease or surrender the premises.⁵⁵ If the receiver elects to adopt a lease, he becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver by which the latter becomes liable upon the covenant to pay rent.⁵⁶

1. *Empire Distilling Co. v. McNulta* (C. C. A.; 1897) 77 Fed. 700, 23 C. C. A. 415: "A receiver does not become liable upon the covenants of the lease because of his position as receiver, but because and only because of his own acts in respect thereto. He becomes liable when he has elected to assume the lease, or has taken possession of the demised premises, and continued in possession, under such circumstances as in the law would be equivalent to such an election."

2. *United States Trust Co. v. Wabash etc. R. Co.* (1893) 150 U. S. 287, 37 L. ed. 1085: The question was whether the receivers of the Wabash system took possession of subordinate leased lines under such circumstances as to charge them with the agreed rental so long as they retained possession of those lines. The general rule was stated to be that a receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the position of the company, if in his opinion it would be unprofitable or undesirable to do so; and he is entitled, said the court, to a reasonable time to elect whether to adopt or repudiate such contracts.

3. *Dayton Hydraulic Co. v. Felsenhall* (C. C. A.; 1903) 116 Fed. 961, 54 C. C. A. 537: A receiver who had neither adopted the lease nor taken any actual possession of the leasehold was nevertheless required to compensate the lessor because the latter had been effectually excluded from taking possession of the premises. "By acts and conduct not involving an actual occupation of the premises, a receiver may come under an equitable obligation to a lessor for rents accruing during the receivership. A court of equity will not suffer an injustice to be done

⁵⁴ For illustrations of various aspects of this subject, and more especially as concerns the attitude of railroad receivers towards property leased by the road prior to the receivership, see the following cases: *St. Joseph etc. R. Co. v. Humphreys* (1892) 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. 795; *Seney v. Wabash etc. R. Co.* (1893) 150 U. S. 310, 37 L. ed. 1092, 14 Sup. Ct. 94; *Central Trust Co. v. Marietta etc. R. Co.* (C. C. A.; 1891) 1 C. C. A. 140, 48 Fed. 875; *Savannah etc. R. Co. v. Jacksonville etc. R. Co.* (C. C. A.; 1897) 24 C. C. A. 439, 79 Fed. 35; *Mercantile Trust Co. v. Farmers' Loan etc. Co.* (C. C. A.; 1897) 26 C. C. A. 383, 81 Fed. 254; *Central Trust Co. v. Continental Trust Co.* (C. C. A.; 1898) 30 C. C. A. 235, 86 Fed. 517; *United States Trust Co. v. Mercantile Trust Co.* (C. C. A.; 1898) 31 C. C. A. 427, 88 Fed. 140; *Brown v. Toledo etc. R. Co.* (1898) 35 Fed. 444; *Central Trust Co. v. Wabash etc. R. Co.* (1898) 34 Fed. 258; *Park v. New York etc. R. Co.* (1893) 57 Fed. 799; *Ames v. Union Pacific R. Co.* (1894) 50 Fed. 298; *Grand Trunk R. Co. v. Central Vermont R. Co.* (1897) 81 Fed. 541; *Central R. etc. Co. v. Farmers' Loan etc. Co.* (1897) 79 Fed. 158; *Manhattan Trust Co. v. Sioux City etc. R. Co.* (1897) 81 Fed. 50. ⁵⁵ *Thomas v. Cincinnati etc. R. Co.* (1896) 77 Fed. 667. ⁵⁶ *United States Trust Co. v. Wabash etc. R. Co.* (1893) 150 U. S. 287, 37 L. ed. 1085.

a lessor by acts or conduct which amount equitably to an exclusion of the lessor from the premises, and an appropriation of them to the supposed benefit of the trust."

§ 2647. Right of Receiver to Take Possession of Leasehold.

It is well settled that the receiver is entitled to take possession of the leasehold and to use the premises for a reasonable time in order to enable him to elect whether he will adopt the contract and make it his own, or surrender the property to the lessor, so far as he is able to do so without affecting the term as between lessor and lessee. Where such possession is taken and the receiver within a reasonable time elects not to adopt the contract, he is bound, of course, to make reasonable compensation. The measure of compensation is not necessarily to be determined by the contract.⁵⁷

§ 2648. Reasonable Time for Adoption or Rejection of Lease.

What is a reasonable time during which the receiver may hold the premises without subjecting himself to liability on the lease depends upon the particular circumstances of each case. Two months and even longer periods have been held to be a reasonable time within which a receiver may exercise his right of election.⁵⁸

Carswell v. Farmers' Loan etc. Co. (C. C. A.; 1896) 20 C. C. A. 282, 74 Fed. 88: A railroad had entered into a contract for the lease of a depot at an exorbitant rate. The receiver kept possession for ten months and then refused to adopt the lease. It was insisted that this was an unreasonable time, and consequently that such retention of possession operated as an adoption of the lease. But it appeared that the parties both understood that the lease would not be adopted by the receiver and that the latter retained possession practically with the consent of the lessor and under an implied understanding that the receiver should occupy, subject to a reasonable rent. It was accordingly held that the receivership could not be charged with rent stipulated for in the lease and that the compensation should be on the basis of a *quantum valebat*.

Speaking on the point of the general principle, the court said: "Whatever the doubt at one time entertained as to the effect of a receiver taking possession of leasehold property under an order of a court of equity, it is now well settled that such a receiver may take and retain possession of leasehold interests for such

⁵⁷ *Kneeland v. Amer. Loan etc. Co.* (1893) 57 Fed. 803; *Farmers' Loan etc.* (1890) 136 U. S. 89, 34 L. ed. 379; *Sparhawk v. Verkeer* (1891) 142 U. S. 1, 13, 35 L. ed. 915, 918; *Quincy etc. R. Co. v. Humphreys* (1892) 145 U. S. 99, 36 L. ed. 638; *Thomas v. Western Car Co.* (1893) 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. 824; *Park v. Railroad Co.* 60 Fed. 968. ⁵⁸ *Amen v. Union Pacific R. Co.* (1894)

reasonable time as will enable him to intelligently elect whether the interest of his trust will be best subserved by adopting the lease, and making it his own, or by returning the property to the lessor."

§ 2649. Implied Adoption of Lease from Retention of Premises.

Unexplained retention of leased premises by a receiver for three years and a half is sufficient to show an adoption by him of the contract of lease. But the presumption thus raised is rebutted where it appears that the retention of possession was under an order of court in which it was expressly provided that the retention should be without prejudice and that the making of payments by the receiver for use and occupation should not be construed as an election on his part to adopt the lease.⁵⁹

§ 2650. Possession of Premises as Affecting Adoption of Lease.

Where the circumstances are otherwise sufficient to establish liability of a receiver on a pre-existing lease, the fact that he did not have actual possession of the leased premises is not necessarily conclusive against his liability. If the decree appointing him receiver describes the leasehold by reference and directs him to take possession, he may be considered to be constructively in possession; and if the order that places the property in his care and custody also contains an injunction prohibiting all persons from interfering with the property, his possession of the leased premises is exclusive, and even the lessor could not re-enter without leave of the court or consent of the receiver.⁶⁰

§ 2651. Injunction to Enforce Specific Performance of Lease Pendente Lite.

Where a railroad receiver elects to insist on the fulfilment of a contract of lease, and the court approves of such course, it may issue an injunction upon his petition to compel the lessor to abide by and perform the lease, if the circumstances are such that specific performances of the lease is necessary to the operation of the road that is in the hands of a receiver.⁶¹

⁵⁹ *Thomas v. Cincinnati etc. R. Co.* (1896) 77 Fed. 667.

⁶¹ *Metropolitan Trust Co. v. Columbus etc. R. Co.* (1899) 95 Fed. 18.

⁶⁰ *Dayton Hydraulic Co. v. Felsen-thall* (C. C. A.; 1902) 54 C. C. A. 537, 116 Fed. 961.

*Receivership Sale.***§ 2652. Sale of Receivership Property—When Sale Complete.**

It is often necessary in receivership proceedings for the court to order a sale of the whole or part of the property involved in the receivership. Such sales are usually conducted by the receiver himself or by a master; and, in general, the same principles of procedure are applicable as in other judicial sales. At a sale by a master or receiver under an order or decree in equity which contemplates a subsequent report and a confirmation of the sale, a bidder becomes a purchaser when the officer announces the sale to him. Thereafter he may be compelled to complete his purchase and pay the price which he offered. Such a sale will not, before confirmation, be opened for bidders, in the absence of proof of fraud or of misconduct at the sale. It will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience.⁶² The old rule of English chancery practice to the effect that the sale is not complete or binding until confirmation has not been followed in this country, and it is now abrogated even in England.⁶³

§ 2653. Receiver Holding as Agent of Purchaser.

If the receiver retains the property in his hands after the time fixed for its delivery to the purchaser at the foreclosure sale or to any other party to the suit, he will usually be considered to hold in the capacity of agent for such purchaser or party.⁶⁴

§ 2654. Title of Purchaser as Affected by Irregularities in Sale.

In regard to the validity of the title acquired by purchase from a receiver, the same general principle applies as in other judicial sales or sales under legal process. The purchaser is not prejudiced and his title is not affected by irregularities connected with the receivership proceedings nor by any mere errors of the court. He is not bound to examine all the proceedings in the case in which the receiver was appointed. It is sufficient, so it has been held, for him to see that

⁶² *Graffam v. Burgess* (1886) 117 U. S. 180, 191, 192, 6 Sup. Ct. 686, 29 L. ed. 469, 474, 16 L. ed. 522, 523; *U. S. Trust Co. v. Pewabic Min. Co.* (1892) 145 U. S. 349, 367, 12 Sup. Ct. 46 L. ed. 319, 887, 36 L. ed. 732, 738.

⁶³ *Files v. Brown* (C. C. A.; 1903) 59 C. C. A. 403, 124 Fed. 133.

there is a suit in equity in which the court appointed a receiver; that such receiver was authorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court, and that the deed accurately recites the property or interest thus sold. If the title of the property vested in the receiver by order of the court, it in that case passes to the purchaser.⁶⁵ Where a transfer or sale of property by a receiver has been approved by the court of his appointment, the propriety or validity of the sale will not readily be questioned by another court.⁶⁶

§ 2655. Deed to Purchaser.

The deed to the purchaser at the foreclosure sale in receivership proceedings should be drawn in pursuance of the decree of sale and its recitals are to be read and interpreted in the light of such decree. Before the purchaser can be held, under the deed, to have voluntarily assumed a greater liability than that required or imposed by the decree, the language of the deed must be so clear and convincing as to make any other interpretation unreasonable and inadmissible.⁶⁷

§ 2656. Reservation of Right to Charge Property in Hands of Purchaser.

If a sale has been made subject to prior liens and claims, the court may, upon ordering the receiver to surrender possession to the purchaser, reserve the right to charge the property with prior claims subsequently found to be valid. Constructive control of the property is thereby retained,⁶⁸ and the court has the power to compel the purchaser to pay the claim or may subject the property to it.⁶⁹

Where a decree of sale imposes on the purchaser the obligation to pay such claims as may be filed within a certain time and which may be adjudged by the court to be a valid charge, a claim not filed within

⁶⁵ *Koontz v. Northern Bank* (1872) 16 Wall. 196, 21 L. ed. 465 (title of purchaser not defeated by irregularity incident to the fact that the receiver's deed was executed and delivered prior to confirmation of the sale by the court).

⁶⁶ *Bradley v. Marine etc. Co.* (1879) 3 Hughes 26, Fed. Cas. No. 1,789, affirmed (1881) 105 U. S. 175, 26 L. ed. 1034.

A party to a receivership cause who holds the receiver accountable for the proceeds of property transferred by him during the receivership cannot after-

wards question the title derived from him; and this, even though the receivership suit is finally dismissed for want of jurisdiction. *Brown v. Bass* (1906) 4 Wall. 282, 18 L. ed. 330.

⁶⁷ *Western New York etc. R. Co. v. Penn Refining Co.* (C. C. A.; 1905) 70 C. C. A. 23, 137 Fed. 343, 365.

⁶⁸ *United Trust Co. v. New Mexico* (1902) 183 U. S. 542, 46 L. ed. 312.

⁶⁹ *Atchison etc. R. Co. v. Osborn* (C. C. A.; 1906) 78 C. C. A. 378, 148 Fed. 606, 610.

the stated time and in accordance with the conditions mentioned in the decree cannot be enforced.⁷⁰

§ 2657. Estoppel of Purchaser to Question Lien.

When a receiver's sale is expressly made subject to liens, incumbrances, and mortgages, and the order confirming the sale treats a certain mortgage as a valid and subsisting charge, the purchaser is estopped to question its validity, supposing it to have been voidable only at its inception and not wholly void. But if the sale is expressly made subject only to "legal" liens and incumbrances the purchaser can maintain a bill to set aside any illegal incumbrance whatever.⁷¹

⁷⁰ Western New York etc. R. Co. v. Richards *a. Halliday* (C. C. A.; Penn Refining Co. (C. C. A.; 1905) 70 1901) 50 C. C. A. 133, 112 Fed. 86. C. C. A. 23, 137 Fed. 343, 367.

CHAPTER LXIV.

RECEIVERS (*continued*).

Suit by Receiver.

- § 2658. Authority for Receiver to Sue Must Be Expressly Given.
- 2659. General and Special Authority to Sue.
- 2660. In Whose Name Suit by Receiver Brought.
- 2661. Action in Right of Receiver.
- 2662. Action in Right of Trust Estate.
- 2663. Law and Equity.
- 2664. Nature of Receivership.
- 2665. Parties to Suit by Receiver.
- 2666. Orders Incident to Allowing Suit by Receiver.
- 2667. Allegation of Receiver's Representative Capacity.
- 2668. Defense to Action by Receiver.
- 2669. Refusal of Receiver to Sue.

Suit by Receiver in Foreign Court.

- 2670. Receiver Cannot Sue in Foreign Jurisdiction.
- 2671. Doctrine of State Courts—Foreign Receiver Allowed to Sue by Comity.
- 2672. Suit by Foreign Receiver Where No Objection Made.
- 2673. What Courts Considered Foreign to Each Other.
- 2674. Exceptions to Rule Disabling Receiver to Sue in Foreign Court.
- 2675. Effect of Assignment to Receiver—Prior Superior Title.

Suit Against Receiver.

- 2676. Receiver Not Suable Except by Leave of Court.
- 2677. Basis of Receiver's Immunity from Suit.
- 2678. Act Done in Private Capacity.
- 2679. Discretion of Court in Granting Leave to Sue.
- 2680. Leave to Sue Receiver in Foreign Court.
- 2681. Order Granting General Leave to Sue.
- 2682. Conditions Incident to Granting Leave to Sue.
- 2683. Incidents of Suit against Receiver.
- 2684. Form of Process against Receiver.

Statutory Right to Sue Receiver.

- 2685. Statute Allowing Receiver to Be Sued without Leave.
- 2686. Nature of Cause on which Receiver Suable.
- 2687. In What Court Suit May Be Brought.
- 2688. Limitation on Statutory Right to Sue.
- 2689. When State Court Cannot Enjoin Receiver.
- 2690. Jurisdiction of Suit by or against Receiver.
- 2691. Citizenship of Receiver as Affecting Jurisdiction.

*Suit by Receiver.***§ 2658. Authority for Receiver to Sue Must Be Expressly Given.**

It often happens that in the conduct of the receivership it is necessary to bring suits in order to vindicate the rights of the receiver himself or to enforce some cause of action inhering in the person or corporation over whose property the receivership extends. It is usually proper and indeed necessary that such suits should be conducted by the receiver. But it is universally held, and the rule is fully established, that a receiver cannot maintain a suit unless authority to do so is expressly conferred upon him either by statute or by order of the court by which he was appointed. It may be admitted that the receiver by virtue of his appointment has various implied powers connected with the administration and conduct of the trust, but the right to sue is not one of them. Where a receiver is appointed in the ordinary exercise of the equity powers, it is highly appropriate that the court of appointment should have the right to say whether the funds in the hands of the receiver should be used for the prosecution of suits of any sort. Where a receiver is appointed in pursuance of a statute, the statute itself must be referred to for the purpose of ascertaining whether it is competent for the receiver to exercise this power, or even for the court of appointment to confer it on him. As the receiver has no inherent authority to sue it is customary for the court of appointment to confer on him the right to sue in all cases where it appears that occasion for the exercise of such power exists or will arise.¹

§ 2659. General and Special Authority to Sue.

The authority of the receiver to sue may be granted in general terms at the institution of the receivership, or special leave may be obtained upon the application of the receiver at any subsequent stage of the proceedings. It has been suggested in one of the state courts that it is injudicious to authorize a receiver generally to prosecute and defend, without further order of the court, any and all actions that may be brought in respect to the receivership, such authority

¹ *Davis v. Gray* (1872) 16 Wall. 219, such suits as may be necessary); *Bay 21 L. ed. 452* (order authorizing receiver State Gas Co. v. Rogers (1906) 147 Fed. to sue in his own name); *Phenix Ins. 559* (receiver authorized to institute ac- Co. v. Schultz (C. C. A.; 1897) 80 Fed. tions at law or suits in equity in any 340, 25 C. C. A. 453 (receiver authorized court for the recovery of any estate, to take any necessary step to get in property, or demand), assets, and for that purpose to bring

being liable to abuse and opening a way for the squandering of the assets.² But this is a matter that should be determined in the discretion of the court upon the facts of each case.

§ 2660. In Whose Name Suit by Receiver Brought.

Assuming that the power to sue is conferred upon a receiver by the court, a question arises as to the form in which the suit should be brought. Of course if there is any statute giving him the right to sue in his own name, or if the court itself has granted leave for the receiver to maintain a suit in his own name, such statute or order is controlling. If, however, as often happens, the power is conferred in general terms without specifying in whose name the receiver shall sue, it becomes of moment to determine whether he should sue in his own name or in the name of the individual or corporation over whose property he has been appointed. There is considerable confusion in the decisions in regard to this point, and it is not easy to extract from them a well-defined rule by which one may be governed. In fact there seem to be two or three different factors that have to be taken into consideration in solving this problem, and it does not appear that the bearing of these different factors has always been clearly appreciated.

§ 2661. Action in Right of Receiver.

The first and most important consideration is that which is based on the distinction, on the one hand, between suits brought on causes of action that inhere in the receiver by virtue of his office and by virtue of the custody and possession that he may have acquired over the property, and, on the other hand, suits based on causes of action accruing to the individual or corporation over whose estate the receiver is appointed. The causes of action that belong to the receiver in his own right accrue after the appointment, while the causes of action belonging to the person over whose estate the receivership is established are commonly such as have arisen prior to the receivership. If the receiver has to sue in his own right as receiver in order to obtain or vindicate possession, or to enforce a right or obligation accruing to him as receiver, it is obvious that the suit should be brought in his own name.³ Although a receiver has not taken actual possession of the particular property included in the receiver-

² *Witherbee v. Witherbee* (1897) 17 (suit to obtain possession should be App. Div. 181, 45 N. Y. Supp. 297. See instituted in name of receiver); *Sing-Frankle v. Jackson* (1887) 30 Fed. 398, *erly v. Fox*, (1874) 75 Pa. 112. In this 401.

³ *Baker v. Cooper* (1869) 57 Me. 388 had been sold by him in pursuance of

ship estate, he may, under express authority to secure and protect the property, maintain a suit to enjoin the doing of an illegal act by a third person which would have the effect of diminishing the value of his trust, as, for instance, by creating a cloud on the title.⁴

§ 2662. Action in Right of Trust Estate.

If the suit is brought in the right of the person over whose estate the receiver is appointed, and in whom the title inheres, the suit should, in the absence of statute or order to the contrary, be brought in the name of that person, suing by the receiver (as a sort of next friend).⁵

§ 2663. Law and Equity.

The distinction above noted between the suit brought by the receiver in his own right and the suit brought by him in the right of the person over whose estate he is appointed is more particularly applicable where the action that the receiver is to institute is to be brought in the law side or in a court of law,⁶ though even in this case the application of the rule is subject to be controlled by the state statutes relating to procedure in actions at law. Where the suit is to be instituted in a court of equity, such court will sometimes permit the receiver to sue in his own name on a right of action that is technically vested in the person over whose estate the receivership has been established. Evidently the court of equity can afford to be more liberal in this respect than the court of law, for its procedure is more flexible and it is not bound by common-law rules of pleading.⁷

authority conferred by the court. The contract of sale was with him. It was held that the suit for the purchase money was properly brought in his own name.

⁴ *Davis v. Gray* (1872) 16 Wall. 219, 21 L. ed. 452.

⁵ *Yeager v. Wallace* (1863) 44 Pa. 294; *Dick v. Struthers* (1885) 25 Fed. 103; *Harland v. Bankers' etc. Tel. Co.* (1887) 32 Fed. 305 (receiver in suit to

foreclose mortgage must sue in the name of the corporation whose property is put in his hands, where the purpose of the suit is to obtain an adjudication that certain real property is subject to the mortgage, and that adverse liens asserted in that property by other persons are invalid).

In Bay State Co. v. Rogers (1906) 147 Fed. 557, the suit was brought in the right of a corporation against a former Eq. Pract. Vol. —97.

trustee to recover on a money demand resulting from abuse of trust. While the bill was originally filed in the name of the receiver, it was afterwards amended, "in accordance with the settled practice, so as to become a bill in the name of a corporation, brought by the receiver under the authority of the court."

⁶ *Glenn v. Marbury* (1892) 145 U. S. 499, 510, 36 L. ed. 790, 794 (holding that the action against the stockholder of an insolvent corporation to recover unpaid assessments on his stock should be brought in the name of the company, and not in the name of the receiver, the suit being brought in the District of Columbia where common-law rules of pleading prevail).

⁷ *Phenix Ins. Co. v. Schultz* (C. C. A.; 1897) 80 Fed. 337, 25 C. C. A. 453;

§ 2664. Nature of Receivership.

Another important distinction to be borne in mind in considering whether the action should be brought in the name of the receiver or in the name of the person over whose estate he is appointed is found in the nature of the receivership and in the nature of the title or interest vested in the receiver. Where, by statute, the receiver is constituted an assignee or trustee, or a quasi-assignee or quasi-trustee, for the purpose of winding up a corporation, he should sue in his own name, for the interest is in him. This applies with special force to receivers of national banks;⁸ and it would apply of course in any case where the title is assigned to or vested in the receiver in any legitimate way. On the other hand, a suit brought by the ordinary interlocutory receiver appointed merely for the purpose of holding and conserving property *pendente lite* should, as already stated, be brought in the name of the corporation.⁹

§ 2665. Parties to Suit by Receiver.

In a suit by a receiver to protect the trust property, the creditors of the corporation of whose property he is receiver are not proper parties. So far as their interests are concerned he is their sufficient representative.¹⁰

§ 2666. Orders Incident to Allowing Suit by Receiver.

In authorizing a receiver to bring certain suits against persons liable to his insolvent, the court may order that such suits shall be prosecuted exclusively for the benefit of such creditors of the insolvent as may elect to indemnify the receiver against the costs and expenses of the litigation and that creditors not so contributing and aiding shall be excluded.

McEwen v. Harriman Land Co. (C. C. A.; 1905) 138 Fed. 797, 809, 71 C. C. A. 163: In giving effect to an order of this kind and thereby excluding from the benefit of the recovery parties who had notice of the order but who had failed to comply with its terms, the court said: "Their failure so to do cut them off from all right to share in said fund. Said order is a barrier in the way of such

Schultz v. Phenix Ins. Co. (1896) 77 Fed. 376. In this suit it was held that the power "to bring such suits" as might be necessary to get in the assets of the company should be so construed as to allow the receiver to sue in his own name in a court of equity to enforce a contract to insure, which contract had been made with the insolvent. ⁸ *Kennedy v. Gibson* (1869) 8 Wall. 498, 506, 19 L. ed. 476, 479. ⁹ *Bay State Gas Co. v. Rogers* (1906) 147 Fed. 559. ¹⁰ *Gray v. Davis* (1871) 1 Woods 420. Fed. Cas. No. 5.715.

right, and it would be inequitable to permit them to stand by and see others execute the bonds and incur the expense involved, and then come in and share in the result."

§ 2667. Allegation of Receiver's Representative Capacity.

A receiver sues in his representative capacity and it is therefore necessary for him, in any action brought by him as receiver, to allege and prove his representative and official character. He must set out facts showing his appointment and the jurisdiction in which it was made. He should also set out so much of the proceedings in the cause as may be necessary to define his character and show that the appointment was legal. In other words, the receiver, like any other person suing in a representative capacity, must show his right and title to maintain the suit.¹¹ The receiver should allege that leave of the court to institute and prosecute the action has been obtained.¹²

§ 2668. Defense to Action by Receiver.

As a receiver obtains no higher interest and can have no better right than the person to whose estate he succeeds, it follows that in any action brought by him the defendant may make any defense that would have been available if the action had been brought against the person whose estate is in the hands of the receiver. Rights of action in the hands of a receiver are therefore subject to any set-off or counterclaim existing at the time of his appointment.¹³ In conformity with this it has been held that where a receiver of a national bank sues upon a note or obligation due to the bank, the maker may set off any deposit or certificate of deposit held by him at the time the bank was put in the hands of the receiver.¹⁴ The fact that the note on which the receiver sues does not mature until after his appointment is not material on the question of the right of set-off.¹⁵

¹¹ Worth *v.* Wharton (1808) 122 N. C. 376, 29 S. E. 370; Hegewisch *v.* Silver (1893) 140 N. Y. 414; Miami Exporting Co. *v.* Gano (1844) 13 Ohio 269; Swing *v.* White River Lumber Co. (1895) 91 Wis. 517, 65 N. W. 174.

A general allegation that the plaintiff was duly appointed receiver in a certain court in a stated proceeding has been held sufficient to make out the receiver's title, without stating further particulars. *In re Beecher's Estate* (1892) 19 N. Y. Supp. 971.

¹² Hatfield *v.* Cummings (1895) 142 Ind. 350, 39 N. E. 859; Davis *v.* Ladoga Creamery Co. (1890) 128 Ind. 222, 27 N. E. 494.

¹³ Wheaton *v.* Daily Tel. Co. (C. C. A.; 1903) 134 Fed. 61, 59 C. C. A. 427; Fischer *v.* Knight (C. C. A.; 1894) 61 Fed. 491, 9 C. C. A. 582; Yardley *v.* Clothier (1892) 49 Fed. 341.

¹⁴ Scott *v.* Armstrong (1892) 146 U. S. 499, 36 L. ed. 1059, 18 Sup. Ct. 148; Snyders *v.* Armstrong (1888) 37 Fed. 18, (criticising Armstrong *v.* Scott (1888) 36 Fed. 63, and Bung Co. *v.* Armstrong (1888) 34 Fed. 94).

¹⁵ Scott *v.* Armstrong (1892) 146 U. S. 499, 36 L. ed. 1059, reversing Armstrong *v.* Scott (1888) 36 Fed. 63.

§ 2669. Refusal of Receiver to Sue.

If a receiver declines to prosecute a suit on behalf of the insolvent corporation of which he is receiver, the company itself may prosecute such suit, making the receiver a defendant and alleging his refusal to act.¹⁶

*Suit by Receiver in Foreign Court.***§ 2670. Receiver Cannot Sue in Foreign Jurisdiction.**

In the administration of receiverships it not infrequently happens that property pertaining to the receivership (and which the receiver desires to get into his possession) is situated in a jurisdiction other than that of the court appointing the receiver, and it sometimes becomes desirable that the receiver should be allowed to enforce personal as well as real rights of action in a foreign jurisdiction. The natural and reasonable thing to do in a situation of this kind would apparently be for the court of appointment to authorize its receiver to bring suit in the foreign jurisdiction. Upon being clothed with this power, it would seem to be proper for the receiver to resort to the foreign tribunal and there institute suit upon such causes of action as might be enforceable in that forum. This course, however, is not feasible in the federal courts, for it is now fully settled in these courts that a receiver has no legitimate extraterritorial power of official action. The appointment of a receiver does not in itself give him any authority to acquire possession of property beyond the jurisdiction of his appointment; and it is not competent for the court, even if it should desire to do so, to confer upon him a power to go into a foreign jurisdiction and there assert any authority whatever, or exercise any function, as receiver. No rule is now more authoritatively settled than that which disables the receiver from suing in a foreign jurisdiction. The right of a receiver to sue in a foreign court cannot be upheld as a mere incident to the office of a receiver. Nor can the court of his appointment clothe him with such power; and any attempt to confer any such authority on him is futile.¹⁷ An express order in general terms authorizing a receiver to bring suit in his own

¹⁶ North Chicago St. R. Co. v. Chicago v. Hale (1902) 117 Fed. 224, 54 C. C. A. Union Traction Co. (1907) 150 Fed. 612, 252; Cohen v. Gold Creek etc. Co. (1899)

¹⁷ Covell v. Fowler (1906) 144 Fed. 95 Fed. 580; Kittel v. R. Co. (1897) 78 535; Fowler v. Oagood (1905) 141 Fed. Fed. 855; Holmes v. Sherwood (1881) 20, 24, 4 L.R.A. (N.S.) 824, 72 C. C. A. 16 Fed. 725; Brigham v. Luddington 276; Edwards v. Nat. Window Glass etc. (1874) 12 Blatchf. 237, Fed. Cas. No. Assoc. (1905) 139 Fed. 795; Wigton v. 1,874; Lehigh Coal etc. Co. v. Central R. Bosler (1900) 102 Fed. 70, 73; Hilliker Co. (1877) Fed. Cas. No. 8,213,

name or in the name of the corporation is without validity when it comes to suing in a foreign jurisdiction;¹⁸ and such an order must be construed as an authority to institute suit in the jurisdiction of appointment and not elsewhere.¹⁹

Booth v. Clark (1854) 17 How. 322, 15 L. ed. 164: Under a creditors' bill filed in a court of chancery in New York state a receiver was appointed. Upon a showing made by him to the effect that the debtor had been awarded a sum of money on a claim against the Mexican government, the court authorized the receiver to sue for the same. This suit had to be brought in a court of the District of Columbia. It was held that the suit could not be maintained.

This case settled the practice in the federal courts, and it effectively limits the receiver, in so far as he derives his authority to sue from his appointment as receiver, to such actions as he may be authorized to bring, either in his own name or in that of the insolvent corporation, within the jurisdiction wherein he was appointed.

Great Western Min. Co. v. Harris (1905) 198 U. S. 561, 49 L. ed. 1163: The doctrine established in the leading case was here expounded by Mr. Justice Day as follows: "The decision in *Booth v. Clark* rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered."

§ 2671. Doctrine of State Courts—Foreign Receiver Allowed to Sue by Comity.

This rule of federal practice stands out in sharp contrast with that which prevails in the courts of most of the states of the Union. It is, to be sure, universally accepted that a receiver appointed in one jurisdiction has no absolute right to bring suit in another; but the

¹⁸ *Hale v. Allinson* (1903) 188 U. S. Augusta etc. R. Co. (1897) 78 Fed. 855; 56, 47 L. ed. 380 (reversing *Hale v. Har-* *Wigton v. Bosler* (1900) 102 Fed. 70; *don* (1899) 95 Fed. 747, 37 C. C. A. 240); *Hilliker v. Hale* (1902) 117 Fed. 224, *Brigham v. Luddington* (1847) 12 54 C. C. A. 252. ¹⁹ *Hazard v. Durant* (1884) 19 Fed. *v. Daube* (1896) 71 Fed. 583; *Kittel v. 471, 477.*

prevailing doctrine in the state courts is to the effect that a receiver appointed in one jurisdiction will be allowed to sue in another upon the ground of comity.²⁰ Such being the doctrine prevailing in most of the states, it is not surprising that this notion of the receiver being allowed to sue by comity should have filtered from time to time into the decisions of the federal courts. We accordingly find numerous *dicta* in the decisions of the circuit courts to the effect that a receiver may be allowed to sue on the ground of comity; and in some cases it has been erroneously ruled in accordance with this view.²¹ But the notion in question receives no countenance in the supreme court.

§ 2672. Suit by Foreign Receiver Where No Objection Made.

If the party defendant does not make timely objection by demurrer or other proper proceeding, a decree rendered against him in a suit instituted by a foreign receiver will possibly not be reversed on appeal, the maintenance of the suit not being in violation of any law of the state, nor in any way contrary to its public policy.²² And certainly if no objection is at any time taken, either in the lower court or on appeal, to the jurisdiction of the court of first instance to entertain a suit brought by a foreign receiver, a decree will be entered in his favor, if the situation in other respects warrants this step.

Great Western Tel. Co. v. Purdy (1896) 162 U. S. 329, 40 L. ed. 986: A suit was successfully maintained in Iowa by a receiver of a corporation, appointed by a court in Illinois, to recover an assessment upon a stock subscription. The jurisdiction of the Iowa court was not called in question in the state court of Iowa (where the suit was originally brought) nor in the federal court to which the suit was removed. Nor was the question raised in the federal court below nor on appeal in the supreme court. If the question had been properly and timely raised, the plaintiff could not have recovered.²³

²⁰ Am. & Eng. Enc. Law (2d ed.) 1108. may be accepted as authority on the
²¹ *Hale v. Hardon* (C. C. A.; 1899) point stated, though this point was not

95 Fed. 747, 37 C. C. A. 240; *Lewis v.* made the basis of the decision. The
 Clark (C. C. A.; 1904) 129 Fed. 570, actual holding here, to the effect that a
 04 C. C. A. 138; *Lewis v. American receiver may sue in a foreign juris-
 Naval Stores Co.* (1902) 119 Fed. 391; diction if the court of such jurisdic-
Hale v. Tyler (1900) 104 Fed. 757;
Rogers v. Riley (1896) 80 Fed. 759;
Failey v. Talbee (1893) 55 Fed. 892;
Olney v. Tanner (1882) 10 Fed. 101, 104;
Chandler v. Siddle (1874) 3 Dill. 479. tion deems fit to allow it on grounds
 of comity, is squarely contrary to the
 repeated utterances of the supreme
 court. *Hale v. Allinson* (1902) 188 U. S. 68.

See *The Willamette Valley* (1895) 68
 Fed. 565, 13 C. C. A. 635. ²³ See observation of Mr. Justice Day
 in *Great Western Min. Co. v. Harris*

²² *Lewis v. Clark* (C. C. A.; 1904) 129 (1905) 198 U. S. 577, 578, 49 L. ed. 1169.
 Fed. 570, 34 C. C. A. 138. This decision

§ 2673. What Courts Considered Foreign to Each Other.

Federal courts and state courts, whether situated in the same or different states, are foreign to each other within the meaning of the rule now under consideration; and federal courts situated in different states are also foreign to each other. But it has been held that where a state is divided into two or more districts and process from one is permitted to run into the other, the authority of the receiver will be allowed to extend throughout the state. In other words, the jurisdiction of a court through its receiver is co-extensive with the limits of the authority of the court to sequester the property of the insolvent.²⁴

§ 2674. Exceptions to Rule Disabling Receiver to Sue in Foreign Court.

The rule that a receiver does not have and cannot be given authority to sue in a foreign jurisdiction applies only in those cases where the right in which he sues is based upon his character as receiver and upon his authority as representative of the court of equity. It has no application to cases where his right to sue is based on an acquired title to the property in respect to which the suit is brought. If by assignment, or by statute, or even by contract, a receiver obtains a title or interest sufficient to give him a standing in a foreign court apart from his character as receiver, there is no difficulty about his maintaining the suit in the foreign court. This idea is illustrated in many decisions from the federal courts.

1. *Belfe v. Rundle* (1880) 103 U. S. 222, 26 L. ed. 337: A final decree of a court of equity dissolved an insolvent life insurance company and, by statute, vested the entire property of the company in the superintendent of the insurance department of the state, for the use and benefit of creditors and policyholders. The effect of the statute was to make him a successor of the corporation for the purpose of winding up its affairs. As such he was held to be the representative of the corporation at all times and places and in all matters connected with its business. Accordingly he was permitted to sue in a foreign jurisdiction.

2. *Hawkins v. Glenn* (1889) 131 U. S. 319, 33 L. ed. 184: Glenn was the trustee of the corporation, which by its deed assigned and transferred to three trustees, for whom he was afterwards substituted, all the property and effects of the corporation, in trust, for the payment of its debts. Glenn subsequently brought a suit in another jurisdiction against a stockholder, Hawkins. The right of Glenn was through an assignment, and he derived title to the property and to the rights of the corporation through a deed. The plaintiff, being a trustee and having title in himself, was in a different position from that of the ordinary receiver, and was therefore entitled to sue.

²⁴ *Horn v. Pere Marquette R. Co.* (1907) 151 Fed. 626, 631.

3. *Oliver v. Clarke* (C. C. A.; 1901) 106 Fed. 402, 45 C. C. A. 300: A receiver appointed under the decree of a court in Wisconsin was permitted to sue in Texas to recover real estate the title to which had been conveyed to him as receiver. He claimed under the conveyance as such, and did not depend upon authority derived from the court of his appointment.

4. *Wilkinson v. Culver* (1885) 25 Fed. 639: A receiver appointed in New Jersey recovered judgment, in the court of his domicil, upon promissory notes. He then sued on this judgment in a foreign jurisdiction. His right to maintain the suit was upheld. Said the court: "The plaintiff does not sue because he is receiver, but because he is a judgment creditor. The action is on the judgment. He must, in order to recover, prove the judgment. He is not required to prove his title as receiver; that was done in the action in New Jersey upon the notes. It was necessary there, in order to obtain the judgment; but, having obtained it, the plaintiff, as an individual, can maintain the present suit."

5. *Lee v. Terbell* (1889) 40 Fed. 44: The plaintiffs as special commissioners appointed by the circuit court in Virginia to sell mortgaged property were authorized to take the bonds of the purchaser in part payment. These were made payable to the commissioners as such. They afterwards brought suit on one of these bonds in a foreign jurisdiction. The right so to sue was upheld because the contract evidenced by the bond was made with them. It was said: "The general rule is familiar that a suit in another state cannot be maintained by persons coming *en autre droit* under the appointment of foreign laws, unless their appointments are repeated under the laws of the state in which they sue. But where, as here, the contract sought to be enforced is made directly to the persons who sue, although they are described in their official characters, it would seem that the suit can be brought by such persons in a foreign jurisdiction in their own names, without the addition of their official character, and that the *descriptio personae* may be rejected as mere surplusage. However this may be, the plaintiffs can sue here upon the promise made to them, just as a foreign executor could sue in such a case without an ancillary appointment here."

6. *Parsons v. Charter Oak Life Ins. Co.* (1887) 31 Fed. 305: The receiver of an insurance company appointed under the laws of Connecticut for the winding up of the affairs of the corporation was allowed to intervene in a suit brought to secure an independent receivership in Iowa, and that suit was dismissed at the instance of such intervening receiver appointed in Connecticut. The right of the latter to the assets of the company was fully recognized and the receiver appointed in Iowa was discharged. This case has been cited as authority in favor of the right of the general receiver of a corporation to sue in a foreign jurisdiction, and hence has been supposed to be an exception to the general rule. But clearly not so. His right to intervene for the purpose of showing his right and procuring a dismissal of an independent receivership proceeding was indeed recognized, but the court indicated that the proper proceeding in Iowa was by means of an ancillary receivership, and it was accordingly ordered that an ancillary receiver be there appointed to take possession of the assets, convert the same into money, and remit the proceeds to the receiver in Connecticut. The Connecticut receiver was merely allowed to intervene, not to sue in Iowa.

§ 2675. Effect of Assignment to Receiver—Prior Superior Title.

Though by assignment a receiver may acquire a title to property which will enable him to maintain a suit in a foreign jurisdiction, a

right so acquired cannot have effect as against persons who have acquired a superior right to the property in the foreign jurisdiction prior to the assignment under which the receiver claims. In other words, an assignment of property to a receiver can have effect only from the time when it is made.²⁵

Suit Against Receiver.

§ 2676. Receiver Not Suable Except by Leave of Court.

As a receiver is not permitted to sue without the leave of the court of his appointment, so likewise it is a rule that he cannot be sued without leave of such court. It is a general principle of equity practice that a suit cannot be brought against a receiver, in his capacity as such, to recover any property in his hands or to recover on any debt, demand, or claim whatever, against him, unless upon previous leave first duly obtained.²⁶ The rule applies to suits brought either in that court or in any other court; and if an unauthorized suit be brought against the receiver, he may successfully plead the disability of the plaintiff.²⁷

A receiver may, however, waive the right to object on this score, and he will not be allowed to take advantage of want of leave where no objection is made until after proof has been taken. Leave of court to institute the suit will be presumed from orders made by the court to facilitate the progress of the suit.^{27a}

One who institutes suit against a receiver without leave thereby renders himself subject to proceedings for contempt and is liable to punishment.²⁸ The court entertaining the receivership may also restrain any such proceeding by injunction.²⁹

§ 2677. Basis of Receiver's Immunity from Suit.

The rule by which a receiver enjoys immunity from being harassed by suits instituted by other persons against him in his official

²⁵ Zacher v. Fidelity etc. Co. (C. C. Sampson (1852) 14 How. 52, 14 L. ed. A.; 1801) 106 Fed. 593, 45 C. C. A. 480; ²⁶ Davis v. Gray (1872) 16 Wall.

²⁶ Barton v. Barbour (1881) 104 U. S. 203, 21 L. ed. 447.

120, 26 L. ed. 672; People's Bank v. Cal-

houn (1880) 102 U. S. 256, 26 L. ed. 101; U. S. 734, 24 L. ed. 136.

Foreman v. Central Trust Co. (C. C. A.; ^{27a} In re Tyler (1893) 149 U. S. 164,

1896) 18 C. C. A. 321, 71 Fed. 776; 37 L. ed. 689; Southern Express Co. v.

Louisville Trust Co. v. Cincinnati (C. C. Railroad Co. (1878) 99 U. S. 191, 25 L.

A.; 1896) 22 C. C. A. 334, 76 Fed. 296; ed. 319; People's Bank v. Calhoun

Ridge v. Manker (C. C. A.; 1904) 67 C. (1880) 102 U. S. 262, 26 L. ed. 102;

C. A. 596, 132 Fed. 599; Minot v. Mastin Texas etc. R. Co. v. Cox (1892) 145 U.

(C. C. A.; 1899) 37 C. C. A. 234, 95 Fed. S. 601, 36 L. ed. 732; Taylor v. Carryl

734. ²⁸ Jerome v. McCarter (1876) 94 (1857) 20 How. 594, 15 L. ed. 1031;

²⁷ Porter v. Sabin (1893) 149 U. S. Thompson v. Scott (1876) 4 Dill. 508.

479, 37 L. ed. 818; In re Tyler (1893) ²⁹ Jones v. Schlapback (1896) 81 Fed.

149 U. S. 182, 37 L. ed. 695; Wiswall v. 274.

capacity is primarily based on the idea that the trust estate is being administered by the court through the hands of its receiver and consequently that this court itself should have the right to adjudicate upon all claims pertaining to the trust. It has sometimes been supposed that the rule in question is limited to situations where the plaintiff seeks to strip the receiver of the possession and control of property held by him as receiver. The supreme court, however, has applied the rule in a broader sense, and has held that no suit whatever can be maintained against the receiver without leave.³⁰ It has been said that if a stranger were permitted to maintain an independent suit against the receiver without leave, he could, after recovering judgment, proceed to enforce satisfaction and thereby obtain advantage over other claimants.³¹

§ 2678. Act Done in Private Capacity.

Leave of the court to sue its receiver is not necessary where he has done an act entirely without the legitimate scope of the receivership and has thereby rendered himself personally liable. If a receiver wrongfully takes possession of the property of another, having no color of right thereto as receiver, an action of trespass will lie against him without leave of the court.³²

§ 2679. Discretion of Court in Granting Leave to Sue.

In passing upon an application for leave to sue its receiver the court of equity exercises a sound judicial discretion. The court will determine whether it is more desirable to protect its receiver from suit entirely or to allow him to be sued in some appropriate form of action and in some convenient forum. Leave will not be arbitrarily denied, but only on the ground of the impropriety or inconvenience of allowing the suit to be maintained. Of course every person having a legal interest to protect is entitled to maintain some sort of proceeding, and if he is not allowed to sue independently, he is clearly entitled to intervene in the receivership cause or to maintain an independent suit when the receivership has been concluded. All that the court of equity therefore has to do is to determine which course is the more desirable to pursue; and leave will be granted if it appears to be proper, but not otherwise.³³

³⁰ *Barton v. Barbour* (1881) 104 U. S. 126, 28 L. ed. 672. ³¹ *Curran v. Craig* (1884) 22 Fed. 101. See *Barton v. Barbour* (1881) 104 U. S. 134, 506, Fed. Cas. No. 18,975.

³¹ *Thompson v. Scott* (1876) 4 Dill. 26 L. ed. 676. ³² *In re Young* (1884) 7 Fed. 855; ³³ *American Loan & Trust Co. v. Central Vermont R. Co.* (1898) 84 Fed. 917.

A petition for leave to sue a receiver will not be granted where the petition fails to show a good cause of action.³⁴

§ 2680. Leave to Sue Receiver in Foreign Court.

An order of court granting general leave to bring suit against a receiver will usually be understood only as authorizing a suit to be brought against him in the particular court where the receivership is pending.³⁵ But the court appointing a receiver has power to authorize a suit to be brought against him in the court of another jurisdiction. Such an order does not confer on the foreign court any administrative power over the receivership property or over the receiver.³⁶

§ 2681. Order Granting General Leave to Sue.

Leave to sue the receiver may be granted upon special application of the party desiring to institute suit, and at any stage of the proceedings prior to the final winding up of the receivership. But the court may, by a general order granted at the time of the appointment of the receiver, give leave to sue in general terms, thereby subjecting the receiver to liability to sued without special leave.³⁷

§ 2682. Conditions Incident to Granting Leave to Sue.

Upon granting leave to sue its receiver the court may attach any reasonable condition to the order, and if necessary, it may modify or revoke an order improvidently granted. Where the court, at the time of granting leave, reserves the right to determine upon the forum in which the suit may be brought, it may subsequently enjoin a proceeding in an independent forum and restrict the plaintiff to the right to institute a proceeding in the court where the receivership cause is pending.³⁸

§ 2683. Incidents of Suit against Receiver.

Independent suits brought against receivers must conform to the ordinary principles governing legal procedure. Thus an original bill

³⁴ *Jordan v. Wells* (1878) Fed. Cas. was to the effect that persons having No. 7,525. demands or claims of any character

³⁵ *Palmer v. Scriven* (1884) 21 Fed. against the receiver might bring suit 354; *Harper v. Printing-Telegraph News* thereon against the receiver in any Co. (1904) 128 Fed. 979. court having jurisdiction in the state,

³⁶ *French v. Union Pac. R. Co.* (1899) and without applying for leave. 92 Fed. 26. ³⁸ *Buckhannon etc. R. Co. v. Davis* (C.

³⁷ *Dow v. Memphis etc. R. Co.* (1884) C. A.; 1905) 68 C. C. A. 345, 125 Fed. 20 Fed. 280, 266. The order in this case 707, (1904) 131 Fed. 115.

cannot be maintained against a receiver unless it states a cause of equitable cognizance.³⁹ The order granting leave to sue a receiver is without prejudice to his right to set up any available defense, and this can be done by plea, answer, or demurrer.⁴⁰

§ 2684. Form of Process against Receiver.

A suit brought against a receiver upon leave of the court of appointment is brought against him in his capacity as receiver, and the process should run against him in his individual name, followed by words descriptive of his official capacity.⁴¹

Statutory Right to Sue Receiver.

§ 2685. Statute Allowing Receiver to Be Sued without Leave.

The general rule which disables all persons from instituting and prosecuting suits against a receiver, unless upon leave of the court of appointment, has been pretty effectually done away with by the following statute.

Act of Aug. 13, 1888, ch. 366, sec. 3: Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.⁴²

³⁹ *Nash v. Ingalls* (1897) 79 Fed. 510, (1900) 41 C. C. A. 545, 101 Fed. 645. those cited elsewhere in this connection.

⁴⁰ *Davis v. Duncan* (1884) 19 Fed. 477. *Eddy v. Lafayette* (1896) 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. 1082; *Eddy v. Lafayette* (C. C. A.; 1892) 1 C. C. A. 441, 49 Fed. 807; *Central Trust Co. v. St. Louis etc. R. Co.* (1889) 40 Fed. 426; *Missouri Pacific R. Co. v. Texas Pacific R. Co.* (1890) 41 Fed. 311; *Jones v. The St. Nicholas* (1891) 49 Fed. 671; *Central Trust Co. v. Chattanooga etc. R. Co.* (1895) 68 Fed. 685; *Stateier v. California Nat. Bank* (1896) 77 Fed. 43; *Wheeler v. Smith* (1897) 81 Fed. 319.

⁴¹ See *Frankle v. Jackson* (1887) 30 Fed. 398, 401. Where suit is to be brought against a corporation that is in the hands of a receiver, process on the corporation should be served on the receiver, for he represents it. *State v. Port Royal etc. R. Co.* (1898) 84 Fed. 67.

⁴² 25 Stat. L. 436. This act is amendatory of the Act of March 3, 1887, ch. 373, sec. 3, but the changes thus made are not of a material character.

The statute conferring the right to sue receivers without leave has been considered in a number of cases. The following are here noted in addition to

A state statute authorizing suits to be brought against the receiver without leave is not effective as regards suits against receivers appointed by federal courts. *Hale v. Duncan* (1877) Fed. Cas. No. 5,914.

§ 2686. Nature of Cause on which Receiver Suable.

It will be noted that the cause of action upon which suit may be brought under this statute must be one arising out of the acts or transactions of the receiver in conducting the receivership. The statute does not extend to contracts and causes of action originating before the institution of the receivership, nor to causes of action unconnected with the receivership.⁴³ The proving of a counterclaim or set-off against a receiver is within the spirit and meaning of the act allowing receivers to be sued.⁴⁴ But a garnishment proceeding is not.⁴⁵

§ 2687. In What Court Suit May Be Brought.

Under this statute an action may be brought in any court, state or federal, having jurisdiction of the parties and of the subject-matter. The action is not limited to the court appointing the receiver or even to a federal court.⁴⁶

§ 2688. Limitation on Statutory Right to Sue.

The most important feature of this statute, so far as regards equity practice, is found in the reservation contained in the second clause. This reservation has at least two important effects, namely, (1) it prevents the creditor who is thus permitted to sue from obtaining any undue advantage over other creditors and claimants, and (2) it prevents such creditor from depriving the receiver, and through the receiver, the court, of the possession or control of any property in his hands by virtue of the receivership.⁴⁷ Land held by a court through its receiver cannot be condemned for use under the power of eminent domain, unless leave of the court has been obtained for the condemnation proceedings. The statute allowing receivers to be sued without leave of court in respect to their official acts does not apply here.⁴⁸

⁴³ *Swope v. Villard* (1894) 61 Fed. 37 L. ed. 689; *Comer v. Felton* (C. C. A.: 1894) 417; *Farmers' Loan etc. Co. v. Green* (1894) 10 C. C. A. 28, 61 Fed. 731; *J. I. Bay etc. R. Co.* (1891) 45 Fed. 605; *Case Plow Works v. Finks* (C. C. A.; 1897) 26 C. C. A. 46, 81 Fed. 529; *Dill-R. Co.* (1894) 59 Fed. 523; *The Jonas H. French* (1902) 119 Fed. 482.

⁴⁴ *Grant v. Buckner* (1898) 172 U. S. 232, 43 L. ed. 430, 19 Sup. Ct. 163.

⁴⁵ *Central Trust Co. v. East Tennessee etc. Co.* (1894) 59 Fed. 523.

⁴⁶ *McNulta v. Lochridge* (1891) 141 U. S. 327, 35 L. ed. 798; *Erb v. Morasch* (1900) 177 U. S. 584, 44 L. ed. 897.

⁴⁷ *In re Tyler* (1893) 149 U. S. 164,

⁴⁸ *Coster v. Parkersburg Branch R. Co.* (1904) 131 Fed. 115; *Buckhammon etc. R. Co. v. Davis* (C. C. A.; 1905) 64 C. C. A. 345, 135 Fed. 707.

The provision that the independent suit against a receiver shall be subject to the general equity jurisdiction of the court in which the receiver was appointed does not make it competent for the appointing court to determine the rights of persons who are not before it or subject to its jurisdiction.⁴⁹

§ 2689. When State Court Cannot Enjoin Receiver.

A state court cannot, under this statute, enjoin a receiver appointed by a federal court from carrying out the decree of his court. It is obvious that the statute must be construed as authorizing suit against the receiver only in cases where he is subject to some sort of legal liability. The receiver manifestly incurs no liability in carrying out the decree of the court, and hence he is not subject to suit at the instance of any one. Besides, the reservation in favor of the general equity jurisdiction of the court of appointment operates to prevent the maintenance of such a suit.⁵⁰

§ 2690. Jurisdiction of Suit by or against Receiver.

A receiver appointed by a federal court derives his authority as such from the laws of the United States, and therefore suits brought by him or against him are maintainable in any federal court without regard to any other jurisdictional fact, as for instance, without regard to the citizenship of the parties.⁵¹

§ 2691. Citizenship of Receiver as Affecting Jurisdiction.

In a suit brought by or against a receiver, if the jurisdiction of the federal court depends on diversity of citizenship as it may where the receiver is appointed by a state court, the individual citizenship of the receiver is to be considered, not the citizenship of the person or corporation over whose estate he has been appointed.⁵²

⁴⁹ *Texas etc. R. Co. v. Johnson* (1894) *Keihl v. South Bend* (C. C. A.; 1896) 151 U. S. 81, 38 L. ed. 81. ⁵⁰ 36 L.R.A. 228, 22 C. C. A. 618, 76 Fed.

⁵⁰ *Royal Trust Co. v. Washburn etc.* 921; *Bausman v. Denny* (1896) 73 Fed. R. Co. (1902) 113 Fed. 531, (C. C. A.; 69.

1905) 71 C. C. A. 579, 139 Fed. 865. ⁵² *Davies v. Lathrop* (1882) 12 Fed.

⁵¹ *Rouse v. Hornsby* (1896) 161 U. S. 353; *Brisenden v. Chamberlain* (1892) 588, 40 L. ed. 817, 16 Sup. Ct. 610; 53 Fed. 307.

CHAPTER LXV.

RECEIVERS (*continued*).

Ancillary Receivers.

- § 2692. Occasion for Institution of Ancillary Receivership.
- 2693. When Ancillary Receiver Unnecessary.
- 2694. Jurisdiction in Ancillary Receivership Proceedings.
- 2695. Who May File Bill for Ancillary Receiver.
- 2696. Decree in Principal Suit as Affecting Proceedings in Ancillary Court.
- 2697. When Same Receiver Appointed as in Principal Cause.
- 2698. Sureties of Ancillary Receiver.
- 2699. Orders of Ancillary Court as Conforming to Orders in Principal Court.
- 2700. Distinct Characters of Principal and Ancillary Receiver.
- 2701. In What Capacity Receiver Must Sue.
- 2702. Receiver Must Act under Court Where Property Administered.
- 2703. Disposition of Assets by Ancillary Court.
- 2704. Exclusiveness of Jurisdiction of Principal and Ancillary Courts.
- 2705. Proper Spheres of Respective Courts.
- 2706. Accounting to Respective Courts.
- 2707. Preference of Local Creditors in Ancillary Jurisdiction.
- 2708. Establishment of Claims in Ancillary Court.
- 2709. Order for Transmission of Assets to Court of Principal Jurisdiction.
- 2710. Protection of Local Creditors Having Claims against General Fund.
- 2711. Effect of Discharge of Ancillary Receiver.

Receiver's Accounting.

- 2712. Duty of Receiver to Account.
- 2713. Form and Details of Account.
- 2714. Vouchers and Books Relating to Receivership.
- 2715. Intervals of Accounting.
- 2716. Order for Accounting.
- 2717. Special Master to Pass on Receiver's Accounts.
- 2718. Notice of Receiver's Accounting.
- 2719. Burden of Proof upon Receiver's Accounting.
- 2720. General Principle Governing Allowance of Claims.
- 2721. No Allowance for Expenditures beyond Scope of Receiver's Authority.
- 2722. Expenditures in Part Beneficial to Trust.
- 2723. Expenses Incurred at Request of Parties Entitled.
- 2724. Money Embezzled by Subordinate.
- 2725. When Losses Chargeable to Receiver—Mismanagement.
- 2726. Allowance of Proper Counsel Fees.
- 2727. No Attorney Fee for Duties Devolving on Receiver.
- 2728. Counsel Fee of Intervening Petitioner.

- § 2729. When Interest Chargeable to Receiver.
- 2730. Submission of Draft Report.
- 2731. Mode of Reviewing Master's Report on Receiver's Account.
- 2732. Federal Practice as to Reviewing Master's Report.
- 2733. Scope of Court's Review.
- 2734. Reopening Account.
- 2735. Order on Receiver to Pay Debt.

Ancillary Receivers.

§ 2692. Occasion for Institution of Ancillary Receivership.

In the preceding chapter we had occasion to consider the peculiarity of the federal practice by which a receiver is unable to sue, even on the ground of comity, in a court of a foreign jurisdiction. It might be supposed that this rule would be fraught with great inconvenience, not to say injustice, in winding up the affairs of corporations or individuals doing business in different states and having assets distributed over a large territory. The difficulty is met, however, by the very convenient and satisfactory practice of instituting ancillary receiverships and appointing ancillary receivers in such foreign jurisdictions where the same becomes desirable or necessary. The practice of appointing ancillary receivers is indeed one of the striking features of the system built up by the federal courts for the administration and winding up of any business in the hands of a receiver, and especially insolvent corporations. It affords the only method for reaching and administering property or assets in a jurisdiction foreign to that where the receiver is originally appointed.¹ The federal courts will appoint ancillary receivers in aid of original receivership proceedings in state courts with the same readiness as in cases where the original proceedings have been brought in a federal court.²

¹ *Fowler v. Osgood* (C. C. A. 1905) 141 Fed. 20, 4 L.R.A. (N.S.) 824, 72 C. A. 276. or impound assets properly forming part of the estate under administration. It avoids unseemly conflicts of judicial authority. It provides a central tribunal for the determination of those questions of general policy which must be decided with reference to a great system of railroads or a great business undertaking, while leaving to local tribunals full power over questions of a local nature." In argument, *Great Western Min. Co. v. Harris* (1905) 198 U. S. 572, 573, 49 L. ed. 1167.

Of this system it has been well said: "It works smoothly in practice. It effectively protects the rights of possible creditors in each jurisdiction where assets are found, by compelling the foreign receiver to give reasonable security and to submit himself to the orders of the local court before removing assets which may be needed to meet the claims of domestic creditors. It provides a convenient forum in which such creditors may prove their claims. It enables the receiver appointed by a foreign court, without delay or publicity or unreasonable expense, to qualify himself to collect

² *Sands v. Greeley & Co.* (C. C. A. 1898) 88 Fed. 130, 31 C. C. A. 424; *Shinney v. North American etc. Co.* (1899) 97 Fed. 9, 11.

Ancillary receivers are sometimes ap-

§ 2693. When Ancillary Receiver Unnecessary.

An ancillary suit for the appointment of an ancillary receiver is not necessary where the property to be administered lies within a particular state but in different federal districts, provided the court of one district has and can exercise jurisdiction over the property of the insolvent throughout the entire state. Federal courts of different states are undoubtedly foreign courts as to each other in as full sense as are state courts of different jurisdictions. But a federal court of one district is not a foreign court as to another federal court of the same state. Federal courts are courts of the whole state. Manifestly this is so where by statute the federal court of one district is authorized to exercise jurisdiction over persons or property in another district of the same state and where the process of a court can run into another district of the same state.³

§ 2694. Jurisdiction in Ancillary Receivership Proceedings.

Though the bill seeking the appointment of a receiver in another district than that in which the main receivership cause is pending is commonly spoken of as an ancillary suit, such a proceeding is distinguished from all other ancillary suits and proceedings by the circumstance that in this case jurisdiction is not dependent on the jurisdiction in the main cause. The bill seeking the appointment of an ancillary receiver must therefore be framed as an original bill, and so far as the power of the ancillary court is brought into play the proceeding is wholly independent. The proceeding is ancillary only in the sense that it is brought in aid of the proceedings in the main cause. A suit for an ancillary receiver cannot be maintained merely for the purpose of obtaining a ratification by the court of one jurisdiction of what has been done in a court of another jurisdiction.⁴ Ancillary receivership proceedings are usually conducted in a spirit of comity, and with an eye to the prevention of unnecessary conflict in the administration of the trust; but in all essential respects the proceedings in the two respective causes rest upon their own distinct basis.⁵

pointed in bankruptcy proceedings. *In re John L. Nelson & Bro. Co.* (1907) 149 Fed. 590; *In re Erie Lumber Co.* (1908) 150 Fed. 830.

³ *Horn v. Pere Marquette R. Co.* (C. C. A.; 1907) 151 Fed. 626. In *Morrill v. American Reserve Co.* (C. C. A.; 1907) 151 Fed. 305, it was said that the circuit court of the Eastern District of Mis- Eq. Prac. Vol. —98.

to take possession of or administer the assets of the defendant companies in the Western District of the same state. But the question was not fully considered.

⁴ *Mercantile Trust Co. v. Kanawha & O. R. Co.* (1889) 39 Fed. 337.

⁵ *New York etc. R. Co. v. New York etc. R. Co.* (1893) 58 Fed. 279.

§ 2695. Who May File Bill for Ancillary Receiver.

The bill seeking the appointment of an ancillary receiver should be brought either by the party who filed the bill in the court of principal jurisdiction, and at whose instance the receiver was appointed, or by some other person who seeks affirmative relief. The original receiver himself is not a proper person to file a bill in the court of ancillary jurisdiction asking for the appointment of himself as receiver. He is merely the officer of the court of his original appointment, and he can show no grievance and can consequently make out no case for relief.⁶

§ 2696. Decree in Principal Suit as Affecting Proceedings in Ancillary Court.

In applications for an ancillary receivership upon bill filed in a court of ancillary jurisdiction, the decree of the court of primary jurisdiction is usually accepted as sufficient evidence that a proper case exists for the appointment of a receiver. For instance, it will be accepted as showing the insolvency of the corporation or other person over whose property a receiver has been appointed. But the court exercising ancillary jurisdiction must pass for itself on the question whether it is proper and necessary to appoint an ancillary receiver in its own jurisdiction.⁷

The propriety of the appointment of the receiver in the court of primary jurisdiction cannot be collaterally attacked in the ancillary proceedings by one not a party to the original suit.⁸

§ 2697. When Same Receiver Appointed as in Principal Cause.

The court in which ancillary proceedings are instituted will usually, as a matter of comity, appoint the same person to be receiver as was appointed by the court of principal jurisdiction.⁹ Especially is this desirable where the property involved in the receivership is a railroad, and it is necessary for the whole system to be operated under one responsible head. It is possible that circumstances might arise such as would justify and even require independent action in the appointment of receivers by the court of ancillary jurisdiction, but

⁶ *Greene v. Star Cash etc. Co.* (1900) 99 Fed. 656.

⁹ *Bay State Gas Co. v. Rogers* (1906) 147 Fed. 557; *Bayne v. Brewer Pottery*

⁷ *Sands v. Greeley* (C. C. A.; 1898) 88 Fed. 132, 31 C. C. A. 424.

⁸ *Co. (1897)* 82 Fed. 391, 395; *Dillon v. Oregon S. L. etc. R. Co.* (1895) 66 Fed.

⁸ *Shinney v. North American Savings etc. Co.* (1899) 87 Fed. 9.

^{622.}

the case would have to be a very unusual one. A court exercising ancillary jurisdiction should, so far as practicable, act with a due consideration for the court of primary jurisdiction.¹⁰

§ 2698. Sureties of Ancillary Receiver.

Upon appointing as ancillary receiver one who has already been appointed receiver in the court of principal jurisdiction, the ancillary court may accept as his sureties bondsmen who are residents of the state of original jurisdiction.¹¹

§ 2699. Orders of Ancillary Court as Conforming to Orders in Principal Court.

The decretal order of the court of ancillary jurisdiction usually expressly confers on the receiver the same power and authority given in the decretal order of the court of original jurisdiction;¹² and as a matter of comity, the court exercising ancillary jurisdiction will conform all its orders and decrees, so far as practicable, to those made in the court of primary jurisdiction. This is done to prevent the embarrassment that would result from the existence of inharmonious decrees in the different courts.¹³ But in following the course of the court of primary jurisdiction, the ancillary court will have due regard to any peculiar local conditions that may require a different disposition. The rule of comity must yield where substantial rights are at stake.¹⁴ In conducting a cause in an ancillary jurisdiction a receiver will be held bound by a condition imposed on him, in respect to the prosecution of such suit, by the court of principal jurisdiction.¹⁵

§ 2700. Distinct Characters of Principal and Ancillary Receiver.

The receiver appointed by the court of primary jurisdiction is a different legal person from the receiver appointed in the court of ancillary jurisdiction, and the circumstance that the same individual is appointed to both offices by the respective courts does not alter the case. This separate and distinct character of the receiver in his two different capacities not only holds in respect to judgments obtained for debts and in respect to the application of property in the hands of

¹⁰ New York, P. & O. R. Co. v. New Flour Milling Co. (1901) 112 Fed. 371. See Farmers' Loan etc. Co. v. Northern

York etc. R. Co. (1893) 58 Fed. 279. See Farmers' Loan etc. Co. v. Northern

¹¹ Taylor v. Life Ass'n of America Pac. R. Co. (1898) 72 Fed. 26.

(1890) 3 Fed. 485. ¹⁴ Conklin v. U. S. Shipbuilding Co.

¹² Bay State Gas Co. v. Rogers (1906) (1903) 123 Fed. 913.

147 Fed. 567. ¹⁵ Wheeling etc. R. Co. v. Cochran

¹³ Central Trust Co. v. United States (1898) 55 Fed. 500.

the receiver to the payment of debts, but also in respect to the management of the receivership property. It follows that if receivers who derive their authority from appointment by both courts commit a tort in one jurisdiction, they can be sued therefor only in their capacity of receiver as derived from that court and cannot be sued in their capacity of receiver as derived from the court of the other jurisdiction. But either court will entertain a suit against them for such tort, if they are sued in their proper capacity and valid service can be had.

Union Trust Co. v. Atchison etc. Co. (1898) 87 Fed. 530: Receivers appointed by a court in Kansas committed a tort there in the course of operating the railway. The plaintiff sued them in a Massachusetts court which had appointed them ancillary receivers over property of the same company situated in that district. It was held that as the tort was committed in Kansas, the receivers must be sued in their capacity as receivers under the decree of the Kansas court. But if service could be had, the suit would lie in the Massachusetts court.

§ 2701. In What Capacity Receiver Must Sue.

Where the same person is appointed receiver in a court of principal jurisdiction and also in a court of ancillary jurisdiction, he must, when suing in the latter court, sue in his capacity as ancillary receiver; and if this fact is not stated in the bill, it will yet be assumed, in order to support the suit, that he does sue as ancillary receiver and as an officer of the court of ancillary jurisdiction, and not as a foreign receiver.^{15a}

§ 2702. Receiver Must Act under Court Where Property Administered.

A person who is appointed receiver in a court of principal jurisdiction and is also appointed receiver of other property belonging to the same person or company in a court of ancillary jurisdiction must be careful not to presume upon the jurisdiction of the latter court by acting in such jurisdiction under orders given by the court of principal jurisdiction, for it may well happen that the court of ancillary jurisdiction will not so far respect the order of the court of principal jurisdiction as to give the receiver the benefit of it. Thus in a case where the court of principal jurisdiction had given the receiver authority to sell property at private sale, the receiver made such a sale in the jurisdiction of the ancillary court without having first obtained a ratification of this order from the latter court. This

^{15a} *Sullivan v. Sheehan* (1898) 89 Fed. 247.

court refused to approve of the sale and held the receiver personally liable for the loss thereby caused. In approving of the course thus pursued by the court of ancillary jurisdiction, Judge Taft, in the court of appeals, observed that it is a mistake to suppose that courts of ancillary jurisdiction are bound to make the same orders as the court of principal jurisdiction. "The whole relation of the two courts," said he, "is merely one of comity." And this comity must sometimes yield to more important considerations arising from local conditions.¹⁶

§ 2703. Disposition of Assets by Ancillary Court.

Though the proceeding in which an application is made for the appointment of a receiver in other jurisdictions than that of the original appointment is said to be ancillary, and though the receiver thus appointed is called an ancillary receiver, it is to be remembered that in appointing such a receiver the ancillary court exercises its own original jurisdiction. The receiver appointed by the ancillary court is its receiver and is completely amenable to its control. It matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from the decree of the court appointing him, and it does not depend upon comity. The assets are thereby brought into the custody of the particular court, and are to be disposed of by it as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts.¹⁷

§ 2704. Exclusiveness of Jurisdiction of Principal and Ancillary Courts.

Where receivership proceedings are instituted in a court of principal or primary jurisdiction and also in a court of ancillary jurisdiction, the two courts respectively exercise, with respect to each other, an exclusive jurisdiction over the property and subject-matter within their respective spheres. Each operates independently of the other. The decree in the court of primary jurisdiction is binding on the court of ancillary jurisdiction so far as relates to the administration of assets properly within the jurisdiction of the primary court, and the decree of the court of ancillary jurisdiction is binding on the primary court so far as relates to the administration of assets properly

¹⁶ *Kirker v. Owings* (C. C. A.; 1899) 98 Fed. 499, 39 C. C. A. 132. ¹⁷ *Sands v. Greeley* (C. C. A.; 1898) 88 Fed. 130, 31 C. C. A. 424.

within the jurisdiction of the court making the decree. Furthermore, it has been held, that even though a federal court of one state acquires jurisdiction, by a voluntary submission of the defendant, over the administration of assets in another state, the subsequent institution of proceedings in that other state whereby the property or estate in controversy is taken into possession by the courts of the latter, destroys the jurisdiction of the court that had already acquired jurisdiction by submission of the defendant. The moment proceedings are commenced and the assets are taken into the possession of the tribunal where they are situated, that moment the party whose estate is thus seized loses power to bind the estate in the court of the other state, either voluntarily or by submitting himself to the jurisdiction of the court.¹⁸

§ 2705. Proper Spheres of Respective Courts.

In settling receivership affairs in different jurisdictions and in passing the accounts of the receiver, the directions of the primary court will control in all matters pertaining to the general administration of the trust, and the directions of the court of ancillary jurisdiction will control in all matters of local administration. Thus the determination of local tax liens and the question as to what shall be done with personal property within the jurisdiction of the ancillary court and encumbered with a local lien are matters of local administration. Even in matters pertaining to local affairs the court of primary jurisdiction will sometimes feel justified in expressing an opinion, relying upon the local court to conform its proceedings therewith as a matter of comity if such course commends itself to the discretion of the local court.¹⁹ All motions relating to matters that have originated in the court of ancillary jurisdiction should be determined in that court.²⁰ General creditors should intervene by petition in the court of primary jurisdiction, and not in the court of ancillary jurisdiction.²¹

¹⁸ *Reynolds v. Stockton* (1891) 140 U. C. A.; 1901) 112 Fed. 237, 60 C. C. A. 254, 35 L. ed. 484, 11 Sup. Ct. 773. The proceedings in the two different jurisdictions are entirely distinct, and the receiver in one jurisdiction has no right to interfere with the proceedings in the other court. *Johnson v. Southern Building etc. Ass'n* (1899) 99 Fed. 646, 649.

¹⁹ *Fletcher v. Harney Peak etc. Co.* (1897) 84 Fed. 555. See the order of the court assuming ancillary jurisdiction in *Baltimore etc. R. Co. v. Freeman* (C.

²⁰ *Jones v. Central Trust Co.* (C. C. A.; 1896) 78 Fed. 568, 19 C. C. A. 509.

Where receiver's certificates had been issued by a court exercising ancillary jurisdiction, the court of principal jurisdiction left to the former court the matter of determining the amount of those certificates and ordering their final payment. *Doe v. Northwestern Coal etc. Co.* (1896) 78 Fed. 62.

²¹ *Central Trust Co. v. East Tennessee*.

§ 2706. Accounting to Respective Courts.

Receivers who have been appointed such in a court of principal or primary jurisdiction and also in courts of ancillary jurisdiction should report and account to the former court in respect of all acts pertaining to their general management and administration of the trust.²² It is the duty of an ancillary receiver, under the orders of his court, to account with and remit to the receivers in the original jurisdiction all funds and assets in his hands.²³

§ 2707. Preference of Local Creditors in Ancillary Jurisdiction.

After a court appointing an ancillary receiver has gathered the assets within its jurisdiction, the question whether those assets shall be distributed for the satisfaction of local creditors by the court itself or whether they shall be transmitted to the court of primary jurisdiction for equal distribution to all creditors by that court depends on the nature of the claims held by the local creditors and also partly upon the discretion of the court having control of those assets. In this connection it may be noted that the federal courts are not governed by local considerations, but they attempt to treat all creditors alike regardless of their citizenship. Undoubtedly the federal courts are, for certain purposes, courts of the state wherein they sit, but in a larger sense they are courts of the whole country. The very circumstance that the federal courts have been given jurisdiction over controversies between citizens of different states is recognition of this broader notion of federal justice, and evinces a fear that the state courts may sometimes be inclined to protect their own citizens at the expense of citizens of other states. But if the states may be expected to be thus local and provincial, it is not so with the federal courts. Here the citizens of the different states are not to be treated as foreigners with respect to each other, and non-residence is not to be considered in weighing equities as between different litigants.²⁴

If local creditors have preferred claims that constitute a prior lien on the assets, it is everywhere recognized as proper that those claims should be first paid out of the assets gathered by the court of

see, V. & G. R. Co. (1886) 30 Fed. 895. ²² Central R. & Banking Co. v. Farmers' Loan etc. Co. (1892) 113 Fed. 405. But see Central Trust Co. v. East Tenn. Mers' Loan etc. Co. (1902) 113 Fed. 405. etc. R. Co. (1895) 69 Fed. 658. ²⁴ See Hammond, J. in Taylor v. Life

²² Ames v. Railroad Co. (1894) 60 Asso. (1890) 3 Fed. 465. Fed. 966; Central etc. Co. v. Farmers' etc. Co. (1902) 113 Fed. 412.

ancillary jurisdiction. Indeed the whole system of ancillary receiverships has in a measure resulted from the recognition of the idea that assets should not be administered by a court of another jurisdiction until local claimants are satisfied. But if the local creditors are on the footing of general creditors and have no priority of lien, it is recognized as being within the discretion of the court, before satisfying those creditors, to transmit the assets to the court of primary jurisdiction to be there distributed *pro rata* to all creditors of the same class. This results in equality among creditors of the same class, and equality is equity. The federal courts make no distinction between foreign and domestic creditors when their claims are of equal validity.²⁵

Sands v. Greeley (C. C. A.; 1898) 88 Fed. 131, 31 C. C. A. 424: In a case where the circuit court of appeals approved the action of the lower court in transmitting assets gathered in New York to the court of primary jurisdiction in Connecticut for general distribution there, without first satisfying the claims of local creditors who had no priority of lien, it was insisted for the local creditors that the assets collected by the New York court were primarily subject to the claims of its citizens and should not be surrendered until those claims were satisfied.

The court observed that there are some expressions in the text-books, and even in the opinions of some of the courts, which sanction this contention, but that an examination of the cases would show that the broad proposition insisted upon had never been ruled. What has been actually decided is that the courts of one state will not recognize the title of a foreign receiver to the prejudice of its own citizens who have fairly acquired title to the assets either by purchase, attachment, or other legal process, or whose claims are entitled to priority as equitable liens.

§ 2708. Establishment of Claims in Ancillary Court.

An order of a court exercising ancillary jurisdiction in a receivership proceeding whereby it undertakes to draw and reserve to itself jurisdiction to settle and determine the claims and demands against the receiver held by citizens of the particular district, is effective to the extent that it authorizes the filing of intervening petitions in that cause by local creditors for the purpose of establishing their claims. But it will not justify an independent suit at law instituted against the receiver without service of process.²⁶

§ 2709. Order for Transmission of Assets to Court of Principal Jurisdiction.

The order for the transmission of assets to the domiciliary court, or court of principal jurisdiction, may be made by the court itself on

²⁵ *Smith v. Taggart* (C. C. A.; 1898) C. A.; 1901) 112 Fed. 237, 50 C. C. A. 87 Fed. 94, 30 C. C. A. 563. 211.

²⁶ *Baltimore etc. Co. v. Freeman* (C.

its own motion or on the application of any party to the ancillary suit. Furthermore, the receiver appointed by the domiciliary court may file an intervening petition in the ancillary court asking that the fund to be distributed be turned over to him.²⁷

§ 2710. Protection of Local Creditors Having Claims against General Fund.

Where the assets collected by an ancillary receiver are transmitted under the order of his court to the court of primary jurisdiction for distribution among the general unsecured creditors, the court so transmitting these assets should see to it that the claims of the local creditors who are entitled to share in that general fund will be recognized and allowed by the court of primary jurisdiction and provision should be made for securing them equality in the general distribution. There is no hard and fast rule, however, to control the court in this respect. It will generally be enough for the ancillary court to adjudicate and determine the claims of local creditors so that they will not have to prove them again in the court of primary jurisdiction. No court exercising primary jurisdiction would presumably be guilty of bad faith in accepting assets from a court of ancillary jurisdiction and then discriminating in any way against the creditors whose claims have been allowed by the ancillary court.²⁸ In one case the ancillary court observed that it was to be presumed that the domiciliary court, or court of primary jurisdiction, would make such a distribution as ought to be made, and it consequently refused to require any pledge to be given, in regard to the method of distribution, as a condition precedent to the transmission of assets.²⁹

§ 2711. Effect of Discharge of Ancillary Receiver.

After an ancillary receiver has been discharged from further power and responsibility by the court that appointed him, a decree rendered against him as receiver is without effect. The circumstance that this loss of representative authority on his part has not been called to the attention of the court, does not strengthen the validity of the proceedings.³⁰

²⁷ Smith *v.* Taggart (C. C. A.; 1898) 87 Fed. 94, 30 C. C. A. 563. ²⁹ Smith *v.* Taggart (C. C. A.; 1898) 87 Fed. 94, 30 C. C. A. 563.
Compare Failey *v.* Talbee (1893) 55 Fed. 892. ³⁰ Reynolds *v.* Stockton (1891) 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. 773.
88 Fed. 133, 31 C. C. A. 424.

*Receiver's Accounting.***§ 2712. Duty of Receiver to Account.**

One of the most explicit duties of the receiver is that of rendering an account of his stewardship to the court of his appointment. This is required not only because the receiver is an officer of the court, and because a formal accounting is necessary before the court can proceed to wind up the trust, but because it is desirable that all the parties in interest should from time to time be able to ascertain the facts pertaining to the administration of the receivership. The duty of the receiver to account is limited to the court of his appointment. This rule applies alike as between state and federal courts and between the different federal courts. An original bill will not lie in one court to compel an accounting by a receiver appointed by another court.³¹

§ 2713. Form and Details of Account.

The receiver's account should specify in detail the state of the property when he received it, and any changes that have since taken place. His receipts and disbursements should be set forth in schedule as specifically as possible.³² If a receiver who is part owner of the property held by him as receiver receives rent on the whole, he must duly account for such part of the rent as represents income from the property owned by the others.³³

§ 2714. Vouchers and Books Relating to Receivership.

As the receiver is bound to account to his court in respect to all his receipts and disbursements, he should always take pains to conduct his business in such way and according to such methods as will make it possible for him to present an intelligible statement. He should preserve vouchers of all his transactions, and if his business is at all complicated, he should have his books kept in such a way that a person skilled in bookkeeping can at any time ascertain the exact state of affairs. The penalty of failing to keep the affairs of the receivership in this way is that the receiver may be deprived of compensation.³⁴

³¹ *Coakling v. Butler* (1865) 4 Biss. ³⁴ *Braman v. Farmers' Loan etc. Co.*

³² Fed. Cas. No. 3,100.

(C. C. A.; 1902) ³¹ C. C. A. 644, 114

³³ 3 Dan. Ch. Pr. 450.

Fed. 18, 22.

³³ *In re Allin* (1881) 8 Fed. 753.

§ 2715. Intervals of Accounting.

According to the practice of the English chancery the receiver was required to account annually;³⁵ but in this country the period within which he should account is usually determined by an order of court made at the time of the appointment or later, or by local rule fixing the intervals at which the receiver's accounts should be rendered.³⁶

§ 2716. Order for Accounting.

If a receiver does not bring in his account within the time limited, a specific order can be obtained against him, at the instance of any interested party, requiring him to proceed with the accounting, and if he fails to do so upon such an order, he can be committed for contempt.³⁷ A delinquent receiver is also subject to be deprived of his compensation on account of his failure to account.³⁸

§ 2717. Special Master to Pass on Receiver's Accounts.

In the English chancery the receiver regularly accounted to the master. In the federal courts it would be an unobjectionable practice for the court itself to pass on the receiver's account and approve them where they are found correct; but inasmuch as the accounts of the receiver are often complicated and extensive, the usual practice is for the court to appoint a special master to take the receiver's accounts, unless there is already a standing master to whom the matter may be referred. A master so appointed exercises a somewhat different function from that exercised by a master who is appointed to report upon a matter referred to him for his own investigation, or who is authorized to take and state an account himself. In reporting on the receiver's account a master acts as a sort of vice-chancellor, and he fulfills a judicial rather than a ministerial function.³⁹

§ 2718. Notice of Receiver's Accounting.

All persons interested in the account should be notified of the time and place of hearing, whether it be before the court or before a

³⁵ 1 Smith, Ch. Pr. (2d ed.) 638.

chancery he was allowed four days

³⁶ For rule of Circuit Court for Eastern District of Louisiana in regard to quarterly accounting of railroad receivers, see rule adopted by that court on June 21, 1885.

within which to bring his account after an order to do so. 3 Dan. Ch. Pr. 450.

³⁷ By the practice of the English

³⁸ 1 Smith, Ch. Pr. (2d ed.) 645.

³⁹ Cowdrey v. Railroad Co. (1870) 1 Woods 334.

master. But it is sufficient where notice is given to the solicitors of such interested partiea.⁴⁰

§ 2719. Burden of Proof upon Receiver's Accounting.

In passing upon the accounts of a receiver the burden is on him to justify the account of his disbursements. To this end he should produce proper vouchers for money paid out by him. Even the pay roll should be vouched. But in a case where master had passed a pay roll account without proper vouchers or verification, the court did not disturb the account on that ground, and disposed of the cause on other points.⁴¹ A receiver whose accounts are lacking in detail will not be required to make a more satisfactory account and produce further vouchers, where the court can see that fraud is not imputable to him and the person insisting on a more detailed showing has been foreclosed of all interest in the fund.⁴²

§ 2720. General Principle Governing Allowance of Claims.

In passing on the accounts of a receiver and in determining what items should be allowed or disallowed reference should be had to the discretion conceded to the receiver in the administration of his trust as well as the extent of authority specially conferred on him by the court. In regard to railroad receivers it has been held that all outlays made by the receiver in good faith, in the ordinary course of business, and with a view to advance and promote the business of the road, and to render it profitable and successful, should be allowed. His duties and the discretion with which he is invested are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. To such outlays in ordinary course may properly be referred not only the keeping of the road, buildings, and rolling stock, in repair, but also the providing of such additional accommodations and instrumentalities as the necessities of the business may require, always referring to the court for advice and authority in any matter of importance that may involve a considerable outlay of money.⁴³

⁴⁰ Cowdrey v. Railroad Co. (1870) 1 Woods 333, Fed. Cas. No. 3,293.

⁴¹ Gutterson v. Lebanon Iron etc. Co. (1907) 151 Fed. 72.

⁴² Lafayette County v. Neely (1884) 21 Fed. 738, 745.

⁴³ Cowdrey v. Railroad Co. (1870) 1 Woods 336, Fed. Cas. No. 3,293. In this case an item of expenditure was disallowed which consisted of a charge for advertising the facilities and accommodations of the road in a local newspaper. The advertisement contained a favorable reference to a local firm as being proper persons to facilitate the forwarding of freight. The receiver was not in fact interested in the business of this firm, but his name was used in the firm style

Traveling expenses of a receiver incurred in going back and forth between his residence and the railway property over which he is receiver and also in traveling to other places in the interest of the property in his custody are properly allowed to him in final settlement.⁴⁴

§ 2721. No Allowance for Expenditures beyond Scope of Receiver's Authority.

A receiver will not be permitted to charge an expenditure incurred in respect to a matter not within the scope of his duty, though the money may have been expended with a view to protecting the property. Thus where a receiver had spent money in defeating a proposed municipal subsidy in aid of the construction of a railroad parallel with the one in his hands, the item was disallowed. The circumstance that the proposed road, if constructed, might have diminished the future earnings of the road in the hands of the receiver did not make it a part of the receiver's duty to oppose the building of the competitive line.⁴⁵ A receiver should not be allowed for payments made for office rent in a distant city where the lease was not sanctioned by the court. But if no exception is taken to the allowance of such a claim, the appellate court will not strike it out.⁴⁶

§ 2722. Expenditures in Part Beneficial to Trust.

Unnecessary expenses or expenses that are not incurred for the sole benefit of the trust should not as a whole be allowed to a receiver. But if it appears that a separable part of the claim represents a valid charge against the receivership, it may be allowed.⁴⁷

§ 2723. Expenses Incurred at Request of Parties Entitled.

Parties entitled to the proceeds of a receivership are estopped from questioning the right of the receiver to be reimbursed for expenses incurred at their request, even though such expenses are incurred in

with his consent. It was held that an advertisement whose object, in whole or in part, was the promotion of the interests of that firm should not be paid for out of the receivership funds.

⁴⁴ *Braman v. Farmers' Loan etc. Co.*
(C. C. A.; 1902) 51 C. C. A. 644, 114 Fed. 21.

⁴⁵ *Northern Alabama R. Co. v. Hopkins* (C. C. A.; 1898) 87 Fed. 505, 31 C. C. A. 94.

⁴⁶ *Cowdrey v. Galveston etc. R. Co.* (C. C. A.; 1876) 93 U. S. 352, 23 L. ed. 950. But in the same case, items were allowed

⁴⁷ *Braman v. Farmers' Loan etc. Co.*
(C. C. A.; 1902) 51 C. C. A. 644, 114 Fed. 21.

connection with an enterprise that is, strictly speaking, outside the scope of the receiver's duties.⁴⁸

§ 2724. Money Embezzled by Subordinate.

The receiver cannot be allowed credit for money stolen or embezzled by his own clerk or employee. Having authority to employ assistance and being allowed proper sums for the compensation of the same, he becomes responsible for the wrongful acts done by his clerks, assistants, or employees.⁴⁹

§ 2725. When Losses Chargeable to Receiver—Mismanagement.

A receiver who by his mismanagement allows an asset belonging to the trust to pass into the hands of an irresponsible person whereby the assets in his hands are depleted, will, on settlement, be charged with the loss. But any property or security that he may have obtained for the lost assets will be allowed for.⁵⁰ If a receiver improvidently squanders the fund or disposes of the property without precedent authority and for an inadequate consideration he will be charged with its value. A failure fully to explain how diminution of the fund took place is sufficient to charge him with the loss.⁵¹ An instructive case as to the conditions under which managing receivers may be held personally liable as for mismanagement of their trust, on account of losses incurred in keeping the business going and for improper diversion of funds, is presented in the case next stated.

Guterson v. Lebanon Iron etc. Co. (1907) 151 Fed. 72: A bill for a managing receivership of a steel plant was filed for the purpose rather of hindering lien creditors than for winding the business up. The answer of the company admitted the allegations of the bill and the receivers were appointed. The business ran sixty thousand dollars behind in eleven months. Meanwhile the receivers had paid out large sums of money on claims that did not represent a first lien on the property. These payments were made upon an order of the court, it is true, but in their application for the order the receivers had represented that they were in funds when in fact they were not. It was held that for these payments the receivers should be held personally liable. Had the real facts been stated the order to pay would not have been made. They were also held guilty of mismanagement of the business in not learning that the business was being conducted at a loss, when the same could have been easily ascertained.

⁴⁸ *Northern Alabama R. Co. v. Hopkins* (C. C. A.; 1898) 87 Fed. 505, 31 Fed. 943.

⁴⁹ *Gunn v. Ewan* (C. C. A.; 1899) 35 Fed. 499. ⁵⁰ *Morehead v. Striker* (1904) 123 C. C. A. 94. ⁵¹ *Kirker v. Owings* (C. C. A.; 1899) 39 C. C. A. 132, 98 Fed. 499.

§ 2726. Allowance of Proper Counsel Fees.

The receiver has implied authority when proper occasion arises to obtain legal counsel, and the reasonable fees of such counsel are among the items commonly allowed in settling the accounts of the master. The allowance of such fees is not made to the counsel directly but to the receiver. The counsel himself has no cause of action, but the allowance is to the receiver to enable him to give the necessary compensation to counsel.⁵² The receivership fund is not chargeable with counsel fees for service rendered in an effort to deplete the fund, nor can a claim be allowed that is partly made up of such a charge. "The receiver should not pay counsel to work for their own interest against his as receiver, nor to work both ways."⁵³

A receiver will not be allowed an item for counsel fees where it appears that the expenditure was made for the maintenance of his individual rights as against the others represented by the receivership and not in the assertion of rights belonging to the receivership.⁵⁴

§ 2727. No Attorney Fee for Duties Devolving on Receiver.

Attorneys' fees will not be allowed to a receiver where there was no particular need for legal services and the duties performed by the attorney were such as devolved by law on the receiver himself. Thus one of the first duties of a receiver is to keep an account of his receipts and disbursements and to present to the court an orderly statement of these as well as a simple narrative of his acts as receiver. The making of such a report does not require technical legal skill, and hence if the receiver employs a lawyer to make up his report he is merely hiring another to do something he is legally bound to do himself. Therefore he will not be allowed any reimbursements for fees so paid away by him.⁵⁵

§ 2728. Counsel Fee of Intervening Petitioner.

An intervening petitioner in a receivership suit can have his counsel fees paid out of the fund only in rare cases, as, for instance, where it appears that the steps taken by him were absolutely necessary to

⁵² Cowdrey *v.* Galveston etc. R. Co. ⁵³ Sowles *v.* Nat. Union Bank (1897) (1871) 93 U. S. 352, 23 L. ed. 950; 82 Fed. 139. Internal Improvement Fund *v.* Green- ⁵⁴ *In re Allin* (1881) 8 Fed. 753. ough (1881) 105 U. S. 536, 26 L. ed. ⁵⁵ Wilkinson *v.* Washington etc. Co. 1161; Stuart *v.* Boulware (1890) 133 U. (C. C. A.; 1900) 102 Fed. 28, 42 C. C. S. 81, 33 L. ed. 561; Elk Fork etc. Co. A. 140. *v.* Foster (C. C. A.; 1900) 39 C. C. A. 618, 99 Fed. 495.

save the property for the benefit of all the creditors and that but for his efforts something would have been lost to the trust. The mere circumstance that he gives timely and important help is not enough. The general rule is that the client must pay his own solicitor.⁵⁶ This rule applies with full force where the intervening petitioner comes in to secure the enforcement of his own individual claim against the receiver. The fact that the intervenor's claim is undisputed and that the receiver should have allowed it without question, does not put the intervenor in a position to charge his expenses, other than the court costs and docket fee, to the receivership funds.⁵⁷

§ 2730. When Interest Chargeable to Receiver.

The receiver is liable for interest where he fails to pay over sums coming to his hands that ought to be turned over to the party entitled thereto. The circumstance that leave of the court is necessary before such a fund could properly be turned over is no defense, if the receiver negligently takes no steps to call the attention of the court to the exact situation in order to get proper leave. The receiver is also liable for interest on any fund held by him on which he could, by proper management, have collected interest.⁵⁸ Interest should also be charged where the receiver keeps the trust fund deposited in a bank to his own private account, and no satisfactory explanation is forthcoming from him.⁵⁹

A receiver who unduly withholds a fund from the beneficiaries while he is litigating for an excessive compensation will not only be charged interest but a further penalty of ten per cent. as damages for the delay caused by his appeal.⁶⁰

§ 2730. Submission of Draft Report.

Where the matter of passing on the receiver's accounts is referred to a master, the latter, after preparing his report, should submit a draft of the same to the parties in the cause, in order that any defects or errors in it may be pointed out and that objections or exceptions may be filed while the report is still in the hands of the receiver.⁶¹

⁵⁶ *Weed v. Central etc. R. Co.* (C. C. A.; 1900) 40 C. C. A. 319, 100 Fed. 162. ⁵⁸ *Wilkinson v. Washington Trust Co.* (C. C. A.; 1900) 42 C. C. A. 141, 102

⁵⁷ *Central Trust Co. v. Valley R. Co.* Fed. 28.

(1893) 55 Fed. 903.

⁵⁸ *Rosenthal v. McGraw* (C. C. A.; 1905) 71 C. C. A. 277, 138 Fed. 721. ⁶⁰ *Cowdrey v. Railroad Co.* (1870) 1 Woods 333, Fed. Cas. No. 3,293. The reader will remember that in some cir-

⁵⁹ *Hinckley v. Gilman etc. R. Co.* (1879) 100 U. S. 157, 25 L. ed. 593. ⁶¹ *cuits* it is not necessary first to take exceptions before the master. They can

§ 2731. Mode of Reviewing Master's Report on Receiver's Account.

There is an old rule of practice, formerly recognized in the English chancery, to the effect that exceptions, in the technical sense, do not lie to the master's report on a receiver's account. The proper remedy, so it was considered, is by petition to rehear or motion to reconsider (while the report is yet in the master's hands) and by petition to review or recommit (when the report is before the court). The same rule was applied in regard to the master's report on a receiver's account as was applied to the master's report in the matter of the taxation of costs. Such reports were not subject to exception, but were subject to review upon petition. However, on petition the court would not consider objections to the particular items of the account, but only objections to the general principle adopted by the master in passing on the account.⁶²

The idea underlying this practice is that a master, in acting on the accounts of a receiver, exercises a judicial discretion, and it is a rule that a master's report on matters of discretion is not subject to exception, but is only subject to review in a proper case.⁶³ Furthermore it may be noted that the receiver whose accounts are to be passed on is himself an officer of the court as well as the master, and the receiver states his own accounts, and submits them to the master as a sort of vice-chancellor. Such an account is not stated by the master as an ordinary account taken before him is supposed to be, but is stated by the receiver and judicially passed on by the master.

§ 2732. Federal Practice as to Reviewing Master's Report.

The distinction here noted between the procedure for the correction of errors in a master's report on a receiver's account and that for the correction of errors in ordinary reports of the master has been casually approved in the federal courts in at least one case;⁶⁴ but the distinction is quite technical, and we have doubts as to its value, and even as to its soundness, as applied to the practice in federal courts. It should be borne in mind that the master, in the English court of chancery, was a well known functionary, and his office formed one of the well known branches of the court. In the federal courts masters are usually appointed upon any special occasion requiring the services of a master, and standing masters are uncommon. It

be taken in the first instance before the court, in accordance with Equity Rule 83. See *ante*, p. 869, § 1484. ⁶³ 2 Smith, Ch. Pr. (2d ed.) 383. ⁶⁴ *Cowdrey v. Railroad Co.* (1870) 1 Woods 334, Fed. Cas. No. 3,293.

⁶² *Shewell v. Jones* (1824) 2 Sim. & Stu. 170; 2 Smith, Ch. Pr. (2d ed.) 383. *Eq. Pract. Vol. -99.*

therefore seems unnecessary to concede to the report of one of our masters the same force and effect that was attributed to the report of a master in the English chancery. From the principle that the master in passing upon a receiver's account acts in a judicial capacity, the English courts derived a rule to the effect that the report of a master on a receiver's account does not require an order of court to confirm it.⁶⁵ We have not seen any suggestion in the decisions of the federal courts recognizing this principle, and undoubtedly in our practice such a report must be approved and confirmed by the court;⁶⁶ and therefore it should be held that it is subject to exceptions the same as other ordinary reports.

§ 2733. Scope of Court's Review.

As the master's report on the receiver's accounts often involves a vast multitude of items that are referable to a few distinct heads, the court will, as a rule, in considering the master's report, confine itself to a consideration of the principle on which the receiver has acted in passing on the various classes of items. If the master appears to have adopted an erroneous principle in allowing an account, the court will either correct the error itself or refer the matter back to the master, with instructions, in order that the items may be corrected by him. It would often be tedious and impracticable for the court to undertake to pass on all the items in detail.⁶⁷

§ 2734. Reopening Account.

Where a receiver's account has been passed upon by the master and confirmed by the court it is not subject to be reopened except upon a direct proceeding showing special reason why the report should be re-examined, such as error, fraud, mistake, or the like. Where there are several receivers some of whom have accounted while others have not, an order of the court that the receivers shall account before the master will be understood as referring to such of them as have not already accounted. Such an order does not authorize the reopening of the account of a master that has already been passed upon and confirmed.⁶⁸

⁶⁵ 2 Smith, Ch. Pr. (2d ed.) 357, 358; *ards v. Morris Canal etc. Co.* (1844) 4 Shewell v. Jones (1824) 2 Sim. & Stu. N. J. Eq. 428. 170.

⁶⁶ In New Jersey it has been expressly held that a master's report on a receiver's account must be confirmed, and the English practice is not followed. Rich. 67 *Cowdrey v. Railroad Co.* (1876) 1 Woods 331, 334, Fed. Cas. No. 3,293. 68 *Farmers' Loan & Trust Co. v. Central Railroad of Iowa* (1890) 1 McCrary 352.

§ 2735. Order on Receiver to Pay Debt.

A court may commit its receiver for contempt in failing to obey its order in respect to the payment of debts incurred by him as receiver. The circumstance that he has no funds does not excuse him where the court has found that the want of funds is attributable to his improvidence or neglect in office, and has made the order requiring him to pay the debts out of his own funds in view of that circumstance.⁶⁹

⁶⁹ *Kirker v. Owings* (C. C. A.; 1899) 39 C. C. A. 132, 98 Fed. 499, 512.

CHAPTER LXVI.

RECEIVERS (*continued*).

Preferential Claims.

a. Charges Created or Arising Pending Receivership Proceedings:

- § 2736. Final Distribution of Receivership Fund.
- 2737. Costs and Expenses—Counsel Fee.
- 2738. Payment of Taxes.
- 2739. Receiver's Petition for Relief against Taxes.
- 2740. Operating Expenses in Case of Managing Receivership.
- 2741. What Are Necessary Operating Expenses.
- 2742. When Claim for Damages Allowed Priority.
- 2743. When Claims May Be Paid.
- 2744. Creation of Preference in Favor of Claim for Betterments.
- 2745. Same—Power Not Exercised in Case of Private Corporation.
- 2746. Preference Created by Consent—Advancements Made by Parties.

b. Charges Created or Arising Prior to Receivership:

- 2747. Power of Court to Prefer Debts Incurred Prior to Receivership.
- 2748. Basis of Power to Prefer Back Debts.
- 2749. Origin and Development of Doctrine.
- 2750. Late Limitation on Doctrine of Earlier Cases.
- 2751. No Preference of Back Debt Unless Chargeable against Current Account.
- 2752. Ground for Preferring Claim Chargeable against Current Account.
- 2753. Diversion of Income as Affecting Right to Charge Corpus.
- 2754. Equity Arising from Failure of Mortgage Creditors to Foreclose.
- 2755. Period for Which Back Debts May Be Preferred.
- 2756. Juncture at Which Question of Priority Determined.

Receiver's Certificates.

- 2757. Power of Court to Authorize Issuance of Lien Certificates.
- 2758. Validity and Character of Certificates as Affected by Order.
- 2759. Order Allowing Sale of Certificates at Reasonable Discount.
- 2760. Same—Effect of State Usury Law.
- 2761. Petition of Receiver for Leave to Issue Certificates.
- 2762. Notice of Application—Effect of Want of Notice.
- 2763. Consent and Estoppel as Affecting Validity of Certificates.
- 2764. Application of Proceeds of Certificates.
- 2765. Strict Construction of Orders Authorizing Certificates.
- 2766. Liability of Receiver for Misrepresentation.
- 2767. Priority of Certificates of Different Series.
- 2768. Estoppel of Purchaser to Question Validity of Certificates.

- § 2769. Modes of Enforcing Lien of Certificates.
2770. When Formal Intervention by Holder of Certificates Unnecessary.
2771. Effect of Undue Delay in Presentation of Certificates.

Preferential Claims.

a. Charges Created or Arising Pending Receivership Proceedings.

§ 2736. Final Distribution of Receivership Fund.

When the receivership proceedings reach their final stage, that is when all the property has been converted into a fund available for distribution, and all the parties interested in the same have been brought before the court upon due references to the master and upon such interventions as may be deemed necessary, and the cause is ready for final disposition, it then becomes necessary for the court to consider and adjust the rights of all the claimants, giving preference to such as may be entitled thereto and distributing any balance equitably among the creditors who are not secured. This problem is often beset with much difficulty, and questions of the greatest delicacy arise in connection with it. This is particularly true of railroad receiverships, where the claimants of the fund are nearly always numerous, and the claims vary in character from those presenting the strongest legal and equitable title to those devoid of all legal claim and possessing only the slightest equity, if any at all, entitling them to preference. To deal minutely with all the various considerations that operate upon courts of equity in determining the relative merit of the many claims that are presented in these causes is not within the proper scope of this treatise; and indeed to undertake to work this subject out in all its ramifications, even from the decisions of the federal courts alone, would apparently require a volume in itself; nor would the results repay for the labor expended. All that will be here attempted is to give an idea of the principle upon which the courts proceed and in a general way to indicate the present drift of judicial opinion, as expressed in the decisions of our higher courts. The chief point of controversy is in connection with the question whether particular unsecured claims can be given preference over debts secured by mortgage or other lien.

§ 2737. Costs and Expenses—Counsel Fee.

The costs and necessary expenses of the receivership are of course chargeable to the funds in the hands of the receiver and are to be paid even before the lienholder or mortgagee can be permitted to share.

The expenses of the receivership are burdens on the property irrespective of the rights of any of the parties and irrespective of any prior liens affected by the proceedings.¹ Whatever can be allowed as part of the taxable costs in any case is entitled to prior payment. It is a general rule that any reasonable expense incurred by the receiver in the care, protection, and control of the property will be allowed as a proper charge; but the receiver is not authorized, without the previous direction of the court, to incur expenses on account of the property in his hands beyond what is essential to its preservation and use, as contemplated by his appointment. In applying this rule due regard must be had not only to the nature and surroundings of the property, but to the exigencies of the moment when the receiver is required to take action involving the safety and proper use of the property.²

Compensation for the services of the attorney or counsel employed by the receiver can be taxed as costs in the cause.³ But as a general rule lawyers' fees for services rendered to the corporation prior to the appointment of a receiver are not entitled to priority, for they are not an expense of the receivership.⁴

§ 2738. Payment of Taxes.

Claims for taxes due on the property are also entitled to share in the proceeds, and they have precedence over the claims of mortgagees.⁵ The receiver should pay all just and lawful taxes assessed against the property in his hands. This he may do without having obtained the previous sanction of the court. The accounts for such payments will usually be passed without question. On the other hand, if the receiver considers a tax to be unlawful and the claim therefor to be unjust, he should not pay it, unless, upon taking the advice of the court, the tax is adjudged to be valid and he is ordered to pay it. It is the receiver's duty to ask for the instruction of the court in every doubtful case. If a controversy arises between the receiver and the taxing authorities, and the receiver refuses to pay a particular

¹ Pennsylvania Ins. Co. v. Jacksonville etc. R. Co. (C. C. A.; 1896) 68 Fed. 421, 13 C. C. A. 550.

² Cowdrey v. Galveston etc. R. Co. (1877) 93 U. S. 352, 23 L. ed. 950.

³ Petersburg Sav. etc. Co. v. Deltatorre (C. C. A.; 1895) 70 Fed. 643, 17 C. C. A. 310 (compensation of receiver and his solicitors allowed as costs and given priority.)

⁴ Louisville etc. R. Co. v. Wilson (1801) 138 U. S. 501, 34 L. ed. 1023;

Finance Co. v. Charleston etc. R. Co. (1892) 52 Fed. 526.

⁵ U. S. Trust Co. v. Mercantile Trust Co. (C. C. A.; 1898) 88 Fed. 140, 31 C. C. A. 427; Mercantile Trust Co. v. Atlantic etc. R. Co. (1897) 80 Fed. 18; Clyde v. Richmond etc. R. Co. (1894) 63 Fed. 21; Central Trust Co. v. Wabash etc. R. Co. (1886) 26 Fed. 11; Georgia v. Atlantic etc. R. Co. (1879) 3 Woods 434.

tax, whereupon the tax officer levies or distrains the property held by the receiver or otherwise interferes with his possession, he may appeal to the court for protection, and if the tax is found invalid, the tax officer will be enjoined.⁶

The receiver is relieved from the burden of paying where the property is sold subject to the tax lien and the taxes are paid by the purchaser.⁷

§ 2739. Receiver's Petition for Relief against Taxes.

A receiver's petition for relief against taxes will not be entertained where the only ground stated is that it is not convenient for him to pay the tax.⁸ Nor will he be granted relief where the tax is found to be legal. The receiver must pay all just and lawful taxes, and the court will not interfere to protect him if he attempts to escape from such payment.⁹ In a case where a receiver sought to enjoin a sale for taxes, the court found that the tax was valid. However, it enjoined the sale as requested by the receiver and ordered that the receiver pay the tax either from funds in his hands, or, failing such, from funds to be derived from sales of the property made by himself.¹⁰

§ 2740. Operating Expenses in Case of Managing Receivership.

Where a receiver is charged with a duty of manager and is required to continue to operate the enterprise or business committed to his care, any expense necessarily and properly incurred as an incident to the continuance and operation of the business constitutes a first lien on the property and funds irrespective of the lien of mortgages or other incumbrances. Such charges are really a part of the cost of the receivership and are chargeable to the fund without regard to the rights of any of the parties.¹¹

⁶ Georgia *v.* Atlantic etc. R. Co. (1879) 3 Woods 437; *Ex p.* Chamberlain (1893) 55 Fed. 704.

⁷ Wheeler *v.* Walton & Whann Co. (1895) 65 Fed. 720.

⁸ Central Trust Co. *v.* Wabash etc. R. Co. (1885) 26 Fed. 3.

⁹ Stevens *v.* Railroad Co. (1875) 13 Blatchf. 104.

¹⁰ Ledoux *v.* La Bee (1897) 83 Fed. 761.

¹¹ Virginia etc. Coal Co. *v.* Cent. R. etc. Co. (1898) 170 U. S. 355, 42 L. ed. 1068; Illinois Trust etc. Bank *v.* Doud (C. C. A.; 1900) 105 Fed. 123, 52 L.R.A. 481, 44 C. C. A. 389; Central Trust Co.

v. Clark (C. C. A.; 1897) 81 Fed. 289, 26 C. C. A. 397; Southern R. Co. *v.* Carnegie Steel Co. (C. C. A.; 1896) 76 Fed.

492, 22 C. C. A. 289; Clark *v.* Cent. R. & B. Co. (C. C. A.; 1895) 66 Fed. 803,

14 C. C. A. 112; Ruhlander *v.* Chesapeake etc. R. Co. (C. C. A.; 1898) 91 Fed. 5, 33 C. C. A. 299; Farmers' Loan

etc. Co. *v.* Green Bay etc. R. Co. (1891) R. Co. (1878) 8 Biss. 315.

While not technically costs, operating expenses may be construed as being within the meaning of the words "costs of suit" as used in a decree adjudicating the order in which the proceeds of a

§ 2741. What Are Necessary Operating Expenses.

Though the general rule that operating expenses are entitled to preference is well settled, it will be found that there is diversity of opinion as to the nature of the items that may properly be brought within this category. The wages of laborers employed in conducting a business in the hands of a receiver are emphatically a claim that is entitled to priority under this head.¹² It has been held that bills incurred in advertising the facilities of a road, such as its train service and other accommodations, are necessary operating expenditures and chargeable as such.¹³ If a receiver is authorized by the court to incur debts for supplies to a limited amount only, creditors at large who advance him supplies in excess of that amount must be considered bound by this limitation, and the court will not allow the claims for such excess as against other claims resting on a better footing.¹⁴

§ 2742. When Claim for Damages Allowed Priority.

Damages for injury to person or property incurred during the receivership and occasioned by the torts of the receiver, his agents, or servants, are classed as operating expenses and are accordingly allowed priority. These claims will be paid out of the net income, if sufficient, but in case of deficiency they may be charged to the corpus.¹⁵

sale should be applied. Farmers' Loan etc. Co. v. Stuttgart etc. Co. (1901) 106 Fed. 565. In Meyer v. Johnston (1875) 53 Ala. 237, 354, the chancellor adjudged that "the costs to be taxed in this cause, including the costs, commissions, and expenses of the sales, the expenses incurred and to be incurred by the receivers in operating said railroad and in the performance of their duties as such receivers, shall be a charge upon the gross proceeds of the sale of all the property herein authorized to be sold, and the balance shall be divided and distributed to the several classes of creditors in the order and to the extent of the respective liens and priorities as ascertained and established under this decree." The principle of the decree was approved by the supreme court, though the incidence of the costs was modified as to some of the parties.

¹² *In re Erie Lumber Co.* (1906) 150 Fed. 823, 824.

¹³ Queen Anne's R. Co. (1906) 148 Fed. 41. But see *Central Trust Co. v. East Tenn. etc. R. Co.* (C. C. A.; 1897) 80 Fed. 624, 26 C. C. A. 30.

¹⁴ *In re Erie Lumber Co.* (1906) 150 Fed. 830.

¹⁵ *Central Trust Co. v. Denver etc. R. Co.* (C. C. A.; 1899) 97 Fed. 239, 38 C. C. A. 143; *Anderson v. Condict* (C. C. A.; 1899) 98 Fed. 349, 35 C. C. A. 335; *Cross v. Evans* (C. C. A.; 1898) 86 Fed. 1, 29 C. C. A. 523; *St. Louis etc. R. Co. v. Holbrook* (C. C. A.; 1896) 73 Fed. 112, 19 C. C. A. 385; *Rouse v. Hornsby* (C. C. A.; 1895) 67 Fed. 219, 14 C. C. A. 377.

But claims for damages resulting from torts committed prior to the receivership cannot be considered as operating expenses arising under the receivership and hence they are not entitled to priority. *Northern Pacific R. Co. v. Heflin* (C. C. A.; 1897) 83 Fed. 93, 27 C. C. A. 460; *Front Street Cable R. Co. v. Drake* (1897) 84 Fed. 257; *Farmers'*

§ 2743. When Claims May Be Paid.

In railroad foreclosure proceedings it is permissible to instruct the master to pay out of the proceeds of the sale claims incurred by the receiver for operating expenses and other preferential claims without waiting for the final audit of the accounts of the master.¹⁶

By approving a claim for expenditures made by a receiver the court thereby ratifies the conduct of the receiver in respect to that matter, and such ratification is equivalent to prior authority from the court.¹⁷

§ 2744. Creation of Preference in Favor of Claim for Betterments.

The power of the court of equity to make a charge a first lien on the assets extends not only to such expenses as are absolutely necessary for the maintenance of the road as a going concern, but it also extends to charges incurred in the making of the betterments and permanent improvements. Before such a charge can be given a preference, it is necessary that the court should have authorized it beforehand and that the charge should have been incurred upon the faith of the court's promise that it should be a preferred claim. To say that the court of equity has the power to create such charges does not necessarily import that it will always do so; and in fact, though the power has been exercised in a few cases, the tendency of the later cases is decidedly against it, except where the permanent improvement or betterment is absolutely necessary to enable the road to be successfully operated. Perhaps the most radical exercise of the power to create preferences in favor of charges incurred for betterments is found in cases where the courts have authorized the receiver to incur debts for the purpose of completing a railroad or portions of it.¹⁸ This power of postponing existing liens to liens created by the court for the purpose of completing an unfinished railroad has rarely been exercised, and ought not to be exerted unless it can be done without ultimate loss to the existing lienholders. It is to be exercised with great caution, and, if

Loan etc. R. Co. v. Northern Pacific R. 17 Girard Ins. Co. v. Cooper (1895) Co. (C. C. A.; 1897) 79 Fed. 227, 24 162 U. S. 544, 40 L. ed. 1068.
C. C. A. 511; Farmers' Loan etc. Co. v. 18 See Wallace v. Loomis (1877) 97 Nestelle (C. C. A.; 1897) 79 Fed. 748, U. S. 146, 24 L. ed. 895; Miltenberger v. 25 C. C. A. 194; St. Louis Trust Co. v. Logansport etc. R. Co. (1882) 106 U. S. Riley (C. C. A.; 1895) 70 Fed. 32, 30 286, 27 L. ed. 117; First Nat. Bank v. L.R.A. 456, 16 C. C. A. 610; Atchison Ewing (C. C. A.; 1900) 103 Fed. 168, etc. R. Co. v. Osborn (1906) 148 Fed. 183, 43 C. C. A. 150.
006, 610, 78 C. C. A. 378.

¹⁶ Miltenberger v. Logansport etc. R. Co. (1882) 106 U. S. 309, 27 L. ed. 126.

not reduced to writing or made sufficiently clear to justify the enforcement of specific performance.²⁵

b. Charges Created or Arising Prior to Receivership.

§ 2747. Power of Court to Prefer Debts Incurred Prior to Receivership.

The most difficult of all the problems connected with the adjustment of priorities is that which arises in connection with unsecured claims, open accounts, and other obligations existing at the time of the appointment of the receiver. The general principle of course is that such claims are not entitled to preference over the prior mortgage debt or other lien. Having come into existence prior to the institution of the receivership, such claims cannot be considered in any sense to be part of the operating expenses incurred under the receivership, and hence the owner of such a claim is, generally speaking, entitled to share only in such of the fund as may be left after the secured debts are paid.

But notwithstanding this general rule, it is well established that a court of equity has the power, in certain classes of receiverships, to create a priority in favor of back debts incurred within a limited and reasonable time prior to the receivership. The exception is almost exclusively confined to receiverships established over railroads and other corporations charged with the performance of public service; and it is limited strictly to claims for expenses of operation prior to the appointment of the receiver and chargeable to the current account. Such priority will commonly be allowed only where the failure to do so would cause misadjustment in the existing business arrangements of the road and interfere with the proper management of the property.

§ 2748. Basis of Power to Prefer Back Debts.

The ground upon which the court of equity presumes to give an unsecured obligation priority over a mortgage or other lien can perhaps be truly indicated as follows: The creation of a receivership involves an exercise of unusual and extraordinary power. A person who has a first lien or mortgage upon any property or business is not bound to ask for a receivership as an incident to the foreclosure of his lien or as an incident to the enforcement of any other legal or equitable right. All the rights of such person, as they exist under the contract, can usually be enforced in a simple foreclosure suit or other

²⁵ Bibber-White Co. v. White River etc. Co. (1901) 110 Fed. 472.

proceeding; and there is no necessity as a matter of law, or even as a matter of strict justice, that the property should be taken from the mortgagor or other person in possession, during the pendency of the suit. But it is obvious that it may often be to the financial interest of the creditor, or of others, that the court should take the property in its own hands and manage it. This will often increase the revenue and in the end produce more than would otherwise be gotten out of the property. But this chance of bettering the financial results is dependent solely on the exercise of equitable discretion. Therefore it is considered that when the court of equity undertakes to appoint a managing receiver for the purpose of increasing the fund for final distribution, it has ample power to impose such terms as seems honest and fair to it. Furthermore, it must be remembered that public corporations are charged with the performance of public duties, and upon assuming the management of them the court of equity will see to it that those public duties are performed. All creditors, however high the nature of their security may be, hold subject to the performance of such obligations to the public, and cannot expect their mortgage or lien to be paid until the public duties have been performed. It follows that a court of equity, in giving priority to unsecured claims incurred prior to the receivership, as an incident to the performance of the public duties of the corporation, cannot be accused of abusing or seriously violating the legal rights or equities of the secured creditor.²⁶

§ 2749. Origin and Development of Doctrine.

The nature of the equitable power to give priority to certain claims created prior to the receivership and the conditions under which this power may be rightly exercised have been the subject of extensive consideration in the federal courts, and the decisions are not by any means in harmony. The doctrine may be denominated a novel one, since it belongs to a period of hardly more than thirty years. The decisions of the supreme court prior to that period afford no traces of the doctrine, as will appear from the following decision.

Galveston etc. R. Co. v. Cowdry (1870) 11 Wall. 459, 20 L. ed. 199: This case antedates the appearance of the doctrine in question and it is decided in conformity with the general principle formerly considered applicable in such cases, namely, that a person secured by a mortgage on a road, its rolling stock, fixtures, and income, has a superior lien on all the additions to the road and its appurtenances,

²⁶*Fosdick v. Schall* (1878) 99 U. S. 235, 25 L. ed. 339, 342; *Hale v. Frost* (1878) 99 U. S. 389, 25 L. ed. 419.

such lien not being subject to be displaced by a claim subsequently accruing for supplies or betterment. One of the claimants in this case had supplied iron for rails on a portion of the road. He insisted this claim should be allowed priority. But the contention was overruled. The court observed that the rails had become a part of the road, and that by allowing his property to go into or become a part of the road, the claimant had consented for it to be covered by the mortgage, and that he acquired no lien that could displace that of the mortgagee. The principle of maritime law by which the last creditor who furnishes necessary supplies to a vessel has priority is not applicable, so the court said, to cases where materials are supplied to a railroad. The common law controls in these cases.

Beginning in the seventies a strong line of cases evinced a liberal tendency in favor of allowing priority to certain unsecured claims for past debts. The way was prepared for this step by a recognition of the very extensive power of the court to create preferences in favor of debts incurred in the use, preservation, and improvement of the railroad system while in the hands of the receiver. The following cases illustrate the beginnings of the doctrine. It will be noted that the question of the power of the court to create preferences is frequently discussed in connection with the right to issue receiver's certificates that shall constitute a first lien. When it had become fully established that the court had power to authorize the issuance of certificates for the purpose of raising money, it was found not to be easy to control the court as regards the purposes for which the money so raised might be expended. The equity in favor of past due debts doubtless owes its recognition largely to this circumstance.

1. *Meyer v. Johnston* (1875) 53 Ala. 237: This is a leading American authority on the question of the power of a court of chancery to issue certificates and create a charge on property in the hands of a receiver that will override a prior mortgage or other lien. The situation was one where it was necessary, or at least highly desirable, that money should be raised for the purpose of preserving the property, procuring equipment, and to keep the railroad in operation as a going concern. It was held that the power in question undoubtedly existed. It was admitted that the railroad itself could not by contract create a charge that would override a prior lien; but it was said that a court of equity, having the property in custody, could allow a debt to be created for the preservation or necessary improvement of the property and refuse to allow the property to pass out of its power until the obligation should be discharged. Among other things the court said: "It seems necessarily to result from the nature of such property, and the capacity and duty of courts of equity to adapt their decrees to all varieties of circumstances which can arise and adjust them to all the peculiar rights of all parties in interest, that if a railroad and its appurtenances are in the hands of a receiver to be preserved and operated, the court having charge thereof must possess the power, after the notice to and hearing of the parties interested, to allow the issue even of negotiable certificates of indebtedness creating a first lien, when this is necessary to raise money for the economical management and the conser-

vation of the property, until it shall be disposed of. The pressure upon the courts in various portions of the country, to exercise such authority, and the consent or acquiescence of first mortgagees and others in the exercise of it, are persuasive that the power must exist." ²⁷

2. *Wallace v. Loomis* (1877) 97 U. S. 146, 24 L. ed. 895: In a suit for the foreclosure of the first mortgage on a railroad, to which the trustees of a second mortgage were parties, the court, with the consent of the parties, appointed receivers, with power to put the road in repair and operate it, and complete any unfinished portions, and procure rolling-stock, and for these purposes to raise money by loan to an amount named in the order, and to issue certificates of indebtedness therefor, which should be a first lien on the property, payable before the first mortgage bonds. The final decree declared that the moneys raised by loan, or advanced by the receivers, and expended on the road, pursuant to their order of appointment, were a lien paramount to the first mortgage, and it directed them and such receivers' certificates or other indebtedness as might thereafter be ordered by the court to be paid, to be paid out of the proceeds of the sale of the road before paying any of the first-mortgage bonds or coupons.

On appeal to the supreme court the decree was sustained. Said Mr. Justice Bradley: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund."

The right of the court to issue certificates and to create a preference in favor of debts contracted with a view to the preservation, use, and improvement of the property while in the custody of the receiver having been established, it was naturally only a little while until the court should be urged to allow priority to debts created prior to the receivership in the course of ordinary business and as a part of the operating expenses. The strong equity presented by some of these claims lent weight to the argument, and accordingly the right was presently recognized, at least so far as the income during the receivership would go to satisfy such claims.

1. *Fosdick v. Schall* (1878) 99 U. S. 235, 25 L. ed. 339: A dictum of this case recognizes the power of the court of equity to devote the income during the receivership to the payment of outstanding debts, existing at the time of the appointment of the receiver, "for labor, supplies, equipment, or permanent improvement of the mortgaged property." It was said that the appointment of a receiver is not a matter of strict right, but is dependent on the exercise of sound

judicial discretion. Consequently the court may, as a condition of issuing the necessary order, impose such terms in reference to the payment of back debts from the earnings as may appear reasonable. In the same case the court recognized the propriety of applying the proceeds of the corpus to the payment of such debt where there has been a diversion of funds from the current income to the payment of interest or the making of valuable improvements.

But the point actually decided in the case was merely this, that a creditor who had sold cars to the railroad two years prior to the receivership was not entitled to preference, the cars having been reclaimed by the seller under a right of reclamation and reasonable rental having been paid for the use of the cars while they were used by the receiver.

2. *Miltenberger v. Logansport etc. R. Co.* (1882) 106 U. S. 286, 27 L. ed. 117: In this case the doctrine appears full-fledged. The second mortgagee of a railroad procured the appointment of a receiver in a foreclosure suit to which the first mortgagee was made a party. Upon appointing the receiver the court saw fit to authorize him to pay operating expenses incurred in the three months preceding. A later order authorized him to pay indebtedness to other connecting lines in settlement of ticket and freight accounts and balances and for materials and repairs which indebtedness had in part arisen several months before the appointment of the receiver. He was also authorized to purchase new rolling-stock and to construct a piece of road forming a necessary connecting link between the different parts of his road. All these charges and disbursements were made a first lien on the road, and were afterwards paid by the master under the orders of the court in preference to the claims of the first mortgagee. All this was upheld as legitimate and proper. Said the supreme court: "It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good-will and integrity of the enterprise, and entitle them to be made a first lien."

3. *Union Trust Co. v. Illinois Midland R. Co.* (1885) 117 U. S. 434, 29 L. ed. 963: In this case many different series of certificates had been issued for various purposes by the successive receivers who had been in charge of a railroad, viz., for such purposes as the payment of tax liens, for necessary repairs of the road,

to replace earnings diverted from operating expenses and from the repair account, to pay wages due employees, and to pay debts incurred in ordinary course of business and due to other roads; also to pay wages incurred in the six months previous to the appointment of the receiver. It was held that all these were valid charges and could be given priority as against the corpus of the property where the income was inadequate.

But in the same case the court refused to allow priority in favor of sums of money borrowed by the receiver without the authority of the court, although the money was used for legitimate purposes, such as are indicated in the preceding paragraph. It was observed that there is never any difficulty in obtaining an order of the court, where one is proper, to borrow money for specific purposes and in a specified total amount. In any event, an item for money borrowed by the receiver will not be allowed priority if the purpose for which the money was used is not shown.²⁸

§ 2780. Late Limitation on Doctrine of Earlier Cases.

The doctrine of these cases has had extensive application in the federal courts during the last quarter of a century. From time to time the supreme court has taken occasion to say that the power thus recognized should be sparingly used; and finally this court has been impelled to reconsider its previous utterances and to limit the doctrine strictly to those situations where the claim is at its inception a proper charge against the current account and where the current income is sufficient to pay such claim or where money has been diverted from that fund. The trend of judicial decision, and the extent of the application of the doctrine at the present time, are indicated in the following cases.²⁹

1. *Kneeland v. American Loan & Trust Co.* (1890) 106 U. S. 59, 34 L. ed. 579: On this occasion, the supreme court speaking through Mr. Justice Brewer emphatically said: "Because in a few specified and limited cases this court has declared

²⁸ 117 U. S. 479.

44 L. ed. 458; *First Nat. Bank v. Ewing*

²⁹ In addition to the cases specially noted, see also *Hale v. Frost* (1878) 99 Fed. 168; *Columbus etc. Co.'s Appeal U. S.* 889, 25 L. ed. 419; *Huidekoper v. Locomotive Works* (1878) 99 U. S. 258, 25 L. ed. 344; *Burnham v. Bowen Co.* (C. C. A.; 1903) 59 C. C. A. 637, (1884) 111 U. S. 776, 28 L. ed. 596; *Fordyce v. Kansas City St. Louis, Alton etc. R. Co. v. Cleveland etc. R. Co.* (1906) 145 Fed. 566; *Fordete. R. Co. v. Morrison* (1888) 125 U. S. 658, 31 L. ed. 832; *Union Trust Co. v. Morrison* (1888) 125 U. S. 591, 31 L. ed. 825; *Sage v. Memphis etc. R. Co.* (1888) 125 U. S. 361, 31 L. ed. 694; *Thomas v. Western Car Co.* (1893) 149 U. S. 95, 37 L. ed. 663; *Virginia etc. Coal Co. v. Central Railroad Co.* (1898) 170 U. S. 266, 42 L. ed. 1068; *Southern R. Co. v. Carnegie Steel Co.* (1900) 176 U. S. 257

(C. C. A.; 1900) 43 C. C. A. 180, 103 Fed. 168; *C. C. A.; 1901* 48 C. C. A. 278, 109 Fed. 177; *Gregg v. Metropolitan Trust Co.* (C. C. A.; 1903) 59 C. C. A. 637, 124 Fed. 721; *Fordyce v. Kansas City St. Louis, Alton etc. R. Co. v. Cleveland etc. R. Co.* (1906) 145 Fed. 566; *Fordete. R. Co. v. Morrison* (1888) 125 U. S. 658, 31 L. ed. 832; *Union Trust Co. v. Morrison* (1888) 125 U. S. 591, 31 L. ed. 825; *Sage v. Memphis etc. R. Co.* (1888) 125 U. S. 361, 31 L. ed. 694; *Thomas v. Western Car Co.* (1893) 149 U. S. 95, 37 L. ed. 663; *Virginia etc. Coal Co. v. Central Railroad Co.* (1898) 170 U. S. 266, 42 L. ed. 1068; *Southern R. Co. v. Carnegie Steel Co.* (1900) 176 U. S. 257

44 L. ed. 458; *First Nat. Bank v. Ewing* (C. C. A.; 1900) 43 C. C. A. 180, 103 Fed. 168; *C. C. A.; 1901* 48 C. C. A. 278, 109 Fed. 177; *Gregg v. Metropolitan Trust Co.* (C. C. A.; 1903) 59 C. C. A. 637, 124 Fed. 721; *Fordyce v. Kansas City St. Louis, Alton etc. R. Co. v. Cleveland etc. R. Co.* (1906) 145 Fed. 566; *Fordete. R. Co. v. Morrison* (1888) 125 U. S. 658, 31 L. ed. 832; *Union Trust Co. v. Morrison* (1888) 125 U. S. 591, 31 L. ed. 825; *Sage v. Memphis etc. R. Co.* (1888) 125 U. S. 361, 31 L. ed. 694; *Thomas v. Western Car Co.* (1893) 149 U. S. 95, 37 L. ed. 663; *Virginia etc. Coal Co. v. Central Railroad Co.* (1898) 170 U. S. 266, 42 L. ed. 1068; *Southern R. Co. v. Carnegie Steel Co.* (1900) 176 U. S. 257

(C. C. A.; 1900) 43 C. C. A. 180, 103 Fed. 168; *C. C. A.; 1901* 48 C. C. A. 278, 109 Fed. 177; *Gregg v. Metropolitan Trust Co.* (C. C. A.; 1903) 59 C. C. A. 637, 124 Fed. 721; *Fordyce v. Kansas City St. Louis, Alton etc. R. Co. v. Cleveland etc. R. Co.* (1906) 145 Fed. 566; *Fordete. R. Co. v. Morrison* (1888) 125 U. S. 658, 31 L. ed. 832; *Union Trust Co. v. Morrison* (1888) 125 U. S. 591, 31 L. ed. 825; *Sage v. Memphis etc. R. Co.* (1888) 125 U. S. 361, 31 L. ed. 694; *Thomas v. Western Car Co.* (1893) 149 U. S. 95, 37 L. ed. 663; *Virginia etc. Coal Co. v. Central Railroad Co.* (1898) 170 U. S. 266, 42 L. ed. 1068; *Southern R. Co. v. Carnegie Steel Co.* (1900) 176 U. S. 257

that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. . . . When a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced."

2. *Finance Co. v. Charleston, etc. R. Co.* (C. C. A.; 1894) 10 C. C. A. 323, 62 Fed. 205: The court of appeals of the fourth circuit, Justice Fuller delivering the opinion, allowed out of the corpus of the estate unpaid balances due upon accounts with other carriers, accruing before the receiver was appointed. The original order appointing the temporary receiver did not contain authority to make such payments but the order appointing the permanent receiver contained this provision: "That said receiver be further authorized to pay all the wages due to the employees, at the date of the order appointing the temporary receiver herein, for labor and services within ninety days before the same, and also all balances due to other carriers and connecting lines, and necessary to be paid for the conducting of the said railroad." These balances in question were not in fact paid by the receiver, and all the income had been absorbed in current expenses. In approving the action of the lower court in charging these items to the corpus, the court said: "Such indebtedness may be given priority, notwithstanding there may have been no diversion of income, or that the order for payment was not made at the time, and as a condition, of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of the particular case, and the character of the claims." But he added that the discretion of entering such orders should be exercised with great care. He also remarked upon the tendency of the supreme court to narrow the limits within which such allowances should be made.

3. *Wood v. New York etc. R. Co.* (1895) 70 Fed. 741, 743: The following summary by Judge Colt is well worthy of being here noted: "In respect to the payment by receivers of a railroad of pre-existing current debts, as constituting a preference over outstanding mortgage liens, out of current income coming into their hands, or even out of the proceeds of the sale of the property under foreclosure, it may be observed—First, that no fixed and inflexible rule can be laid down, but that each case is to be largely governed by its own special circumstances; second, that the tendency of judicial decision is to narrow, rather than enlarge, the class of such preferred claims; third, that the allowance of such claims does not depend upon any fixed or arbitrary rule as to the time when the debts were contracted, further than that they must have been incurred within a reasonable time before the appointment of receivers, such reasonable time depending upon the circumstances of each particular case; fourth, that the allowance of such claims does not depend upon the order of the court appointing receivers; fifth, that the current income of a railroad is primarily to be devoted to the pay-

ment of current debts, and that where such income has been used for the payment of interest upon mortgage indebtedness or for permanent improvements, or in any manner has been diverted for the benefit of the mortgagees at the expense of the current debt fund, there must be a restoration to the extent of such diversion; sixth, that, independently of the question of diversion, debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern from day to day, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road."

In this case the claim was for coupling links, pins, and tank steel furnished to the road within four months preceding the appointment of the receiver. The order appointing the receiver had authorized him to pay accounts for supplies incurred within four months in the operation of the road. The claim was allowed out of the current earnings. The effect was to give it preference over the mortgage lien.

4. *Gregg v. Metropolitan Trust Co.* (1905) 197 U. S. 183, 49 L. ed. 717: Within the six months preceding the appointment of a railroad receiver, one G. furnished cross ties to the road. They were needed to replace ties already decayed. A large proportion were on hand when the receiver was appointed and were used by him. It was conceded that the ties were necessary to preserve the road and keep it in a safe and fit condition for use. It was held that this claim was not chargeable to the corpus so as to displace the pre-existing mortgage lien of the plaintiff to that extent. But it was admitted to be a valid charge against the surplus earnings, if any existed. The case of *Miltenberger v. Logansport etc. R. Co.* (1882) 106 U. S. 286, 27 L. ed. 117, was distinguished; and the authority of that and similar cases was thereby much weakened. Three judges dissented. According to the doctrine of the majority as expressed in this case, a claim not expressly given precedence by the court as a condition of its exercise of its equitable powers cannot be charged to the corpus, unless it is shown that there was a diversion of funds to the corpus that ought properly to have been applied to the payment of the claim, or unless the claim is for labor, or otherwise appears to represent an expenditure absolutely essential to the conduct of the business of the road as distinguished from the preservation of its properties.²⁰

5. *Dickinson v. Saunders* (C. C. A.; 1904) 63 C. C. A. 666, 129 Fed. 16: In proceedings to foreclose a mortgage executed by a granite company and to wind up the corporation and distribute its assets, a receiver was appointed (at the instance and special prayer of the plaintiff) to manage the business and keep it going during the foreclosure proceedings, the idea being to make its assets of the greatest possible value. By the order of appointment the receiver was authorized to pay sums then due to employees. The court below subsequently required the receiver to pay debts due to workmen for service rendered in the three or four months prior to the appointment of the receiver, and the claim was given preference over the mortgage debt. This was approved by the court of appeals.

²⁰ Since this case was decided by the Supreme Court it has come to be regarded as the rule that supplies furnished to a railroad are not, where there has been no diversion of income, entitled to precedence over a mortgage lien, record.

§ 2751. No Preference of Back Debt Unless Chargeable against Current Account.

The most important point to be here borne in mind is found in the proposition that a claim created prior to the receivership can never be given preference unless it arises in immediate connection with the operation and conduct of the business and is of such nature as to be chargeable to the current account. No expenditure is considered of this nature where it is made for purposes of making permanent additions or improvements to the property or where it is of an unusual or extraordinary character and not chargeable to the current account. Even equipment, if supplied in an unusual quantity or under conditions not absolutely requiring it, is not chargeable to the current income, and hence cannot be preferred.⁸¹ A claim accruing against a railroad, prior to the appointment of the receiver, for the construction of a stone pier and abutments for a railroad drawbridge over a city street cannot be made a preferred claim where there is no surplus income from which it can be paid and no diversion is shown.⁸² Nor is a claim entitled to preference that represents an obligation of a railroad for the rental of terminal facilities where such facilities do not form an integral part of the road. The same is true of a claim for the cost of constructing tracks in and around such terminal.⁸³

§ 2752. Ground for Preferring Claim Chargeable against Current Account.

The equity in favor of claims chargeable against the current account grows out of the fact that they are debts incurred under circumstances supporting the presumption of an expectation that they should be paid out of current income. If credit is given by agreement upon such claims for a time which indicates that there was no expectation that the current earnings were to be applied in their payment, or they are allowed to stand unsettled, and without suit, for such a time as indicates that the creditor has ceased to look to current earnings, he will be regarded as a simple unsecured creditor,

⁸¹ *Lackawanna etc. Co. v. Farmers' Continental Trust Co.* (C. C. A.; 1901) *Loan etc. Co.* (1900) 176 U. S. 298, 315, 111 Fed. 669, 49 C. C. A. 629. 44 L. ed. 475, 484.

⁸² *International Trust Co. v. T. R. Townsend Brick etc. Co.* (C. C. A.; 1899) 37 C. C. A. 396, 95 Fed. 850. Claims for necessary repairs prior to the receivership may be allowed a preference, but not claims for reconstruction. *Lee v. Pennsylvania Traction Co.* (1900) 105 Fed. 405.

⁸³ *St. Louis Merchants' etc. R. Co. v. Co.* (1900) 105 Fed. 405.

relying alone upon the general credit of the company, and not upon the interposition of a court of equity.³⁴

1. *Illinois Trust & Sav. Bank v. Doud* (C. C. A.; 1900) 52 L.R.A. 481, 44 C. C. A. 389, 105 Fed. 123: This case contains an elaborate examination of the authorities and a very full discussion of the principle governing the right to give preference to an unsecured claim; and in the light of the present attitude of the supreme court, the résumé here given is entirely correct. The question was whether a creditor who had loaned money to pay interest on a prior mortgage debt was entitled to be repaid in preference to the mortgage debt. It was held that he was not so entitled. Sanborn, Circuit Judge, said: "A claim for money borrowed or for service rendered or material furnished to construct a necessary, permanent, and beneficial improvement or addition to the mortgaged property of a quasi-public corporation is not entitled in equity to a preference in payment out of the mortgaged property or income over the claims of the bond holders secured by the lien of the prior mortgage, in the face of which the claim accrued; and neither the fact that the consideration of the claim conserved the property, increased the security of the mortgagee, and rendered the operation of the property more economical, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure the payment of the claim, can raise such an equity as will entitle it to a preferential lien upon either the income or the corpus of the mortgaged estate over the lien of the prior mortgage."

It was pointed out that the dictum in *Fosdick v. Schall* (1878) 99 U. S. 235, 252, 25 L. ed. 339, 342, to the effect that "necessary operating and managing expenses, proper equipment, and useful improvements" are to be deducted from the current income before the net income out of which the mortgage debt is to be paid arises, has been disapproved and modified; and that the class of claims entitled to equitable preference has been limited, by later decisions, to such as are incurred for the current expenses of the operation of the mortgaged property in the ordinary course of the business of the mortgagor and which are chargeable to the current account.³⁵

The following propositions were then stated as a result of an examination and analysis of the facts and opinions in all the cases decided prior to that time in the supreme court upon the subject of preferential claims in suits to foreclose mortgages upon the property of quasi-public corporations:

"A mortgagee of the property, acquired and to be acquired, and of the income of a quasi-public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses, before the net income to which he is entitled arises.

"A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may prefer unpaid claims for current expenses

³⁴ *International Trust Co. v. Town- Farmers' Loan etc. Co.* (1900) 176 U. S. send *Brick etc. Co.* (C. C. A.; 1899) 37 298, 44 L. ed. 475; *Southern R. Co. v. C. C. A. 396, 95 Fed. 850.* *Carnegie Steel Co.* (1900) 176 U. S. 997,

³⁵ See *Lackawanna Iron etc. Co. v. 44 L. ed. 458.*

of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property.

"If such a mortgagor diverts the current income from the payment of current expenses to the payment of interest on the mortgage debt, or to the improvement of the mortgaged property, so that current expenses remain unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion.

"The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. . . . The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property, which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred. . . . If the consideration of a claim is not a part of the current expenses of the ordinary operation of the mortgaged property, but is a part of the expense of constructing a permanent addition or improvement to it, out of the ordinary course of its operation, neither the fact that it tended to conserve and improve the property and increase the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure it, will give the claim a preferential equity over the lien of a prior mortgage."

2. *Rodger Ballast Car Co. v. Omaha, Kansas City etc. R. Co.* (C. C. A.; 1907) 83 C. C. A. 403, 154 Fed. 629: The unsecured claim for which priority over the mortgage lien was asserted arose out of the purchase of ballast cars a short time before the road was put into the hands of a receiver. It was conceded that the purchase of the ballast cars was necessary to keep the railroad a going concern and to continue its business and operation, and that the purchase of these cars conserved and improved the mortgaged property and increased the security of the bondholders secured by the mortgage. On the other hand, there was no evidence that the company had ever bought so large a lot of cars before, or that in the ordinary course of its business it was accustomed to purchase such a lot as a part of the current expenses of the operation of the road. On the contrary, the expense of this purchase was shown not to be a current or customary expense. It was an unusual outlay incurred on an extraordinary occasion to answer an unprecedented demand. Accordingly it was held that the claim could not be allowed a preference. The opinion was by Sanborn, Circuit Judge. After referring to the preceding case, he observed that the opinions of the supreme court on this subject, since that decision was rendered, disclose no modification of the propositions of law formulated in that case, save that the class of claims that may be preferred has been still further restricted by the holding in *Gregg v. Metropolitan Trust Co.* *ante*, p. 1588.

§ 2753. Diversion of Income as Affecting Right to Charge Corpus.

An equity sufficient to justify the allowance of an unsecured claim for supplies out of the corpus of the property arises where there has been what is called a diversion of income from the current expense account to the payment of the mortgage debt or interest upon it or perhaps even to permanent improvements. In such case any unsecured claim properly allowable against the income from which the diversion took place may be allowed to that extent against the corpus itself.³⁶

International Trust Co. v. T. B. Townsend Brick etc. Co. (C. C. A.; 1899) 37 C. C. A. 396, 95 Fed. 850: Lurton, Circuit Judge, after giving an account of the principle on which a claim for supplies or other operating expenses may be made a preferred charge against the income or "current debt fund," proceeded to give an account of the origin of the "diversion" or "restoration" doctrine. Said he: "These 'debts of the income' are an 'equitable charge' only upon the 'current income' of the mortgaged railroad. If such debts remain unpaid when the railroad passes into the possession of a court of equity, this 'equitable charge' is continued, and attaches to the 'surplus income' arising under the receivership. If this surplus income is not applied to the payment of the debts to which it is primarily devoted, but is expended for the benefit of the mortgagee, as in payment of interest, or in the purchase of property which passes under the mortgage, or in betterments of the railroad itself, an equity arises, as a consequence of such diversion, which will justify a court of equity in requiring the mortgagees to restore to the income that which has been taken away. The power of the court to displace mortgage liens in favor of such unsecured debts of the mortgagor depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgage, and the extent to which the corpus of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion."

§ 2754. Equity Arising from Failure of Mortgage Creditors to Foreclose.

Where the mortgage creditors fail to take possession of the property promptly upon default or to institute foreclosure proceedings, but, on the contrary, stand by and see outsiders advancing money in the effort to keep the property on sound footing, an equity arises that will give the unsecured creditor a right of priority over the mortgage. This equity is especially strong where the creditors themselves have actually obtained advancements and supplies to be used in sustaining

³⁶ A petition for the allowance of a pointment of the receiver. International Trust Co. v. Townsend Brick etc. Co. claim for current supplies out of the corpus of the trust fund, there being no surplus income, must allege a diversion of income either after or before the ap-

the tottering enterprise on which they hold the first mortgage. Here they are practically estopped to questions that such advances are a first charge on the proceeds of the sale in preference even over their mortgage lien.

Queen Anne's Ferry etc. Co. v. Queen Anne's R. Co. (1906) 148 Fed. 41: This case furnishes a good illustration of the equity in question. The mortgage creditors (bondholders) instead of requiring the trustee to take possession on default in accordance with the provisions of the mortgage, proceeded instead to select a committee of their own number to manage the insolvent property and keep it going. This committee incurred debts for supplies and operating expenses. Afterwards the property was foreclosed and bought in, virtually by representatives of the mortgage creditors. It was held that the debts incurred by the managing committee had a preferential equity in the proceeds. This committee was in fact and in effect the agent of the bondholders, and the debts contracted by it in doing what it was appointed to do were in equity the debts of the bondholders themselves.

§ 2755. Period for Which Back Debts May Be Preferred.

In regard to the period preceding the appointment of the receiver during which claims for supplies can properly be made preferential, six months seems to have been conventionally adopted as the proper time beyond which the court should not usually go.³⁷ But this period is by no means an inexorable limitation, and the court may, in its discretion, give priority to a claim arising more than six months before the appointment of the receiver.³⁸

St. Louis Merchants' etc. Co. v. Continental Trust Co. (C. C. A.; 1901) 49 C. C. A. 529, 111 Fed. 669: In the order directing the receiver to take possession and operate said railroad, it was, among other things, directed that the receiver, out of the income of the receivership and after paying his operating expenses and taxes due or to become due, should pay all amounts due or to become due employees of said railroad company, all claims for labor and services, all claims for materials and supplies furnished said railroad company within six months prior thereto, and all balances due or to become due to other railroad or transportation companies on balance accruing within six months prior hereto. This was said to be the usual order for the payment of six months' claims.

³⁷ *Gregg v. Metropolitan Trust Co. Southern R. Co. v. Carnegie Steel Co.* (1905) 197 U. S. 196, 49 L. ed. 721; (1900) 178 U. S. 257, 44 L. ed. 458, 29 *Bosworth v. St. Louis Terminal, etc. Sup. Ct. 347, affirming* (1896) 22 C. C. Ass'n (1899) 174 U. S. 182, 43 L. ed. A. 289, 76 Fed. 492; *Atkins v. Petersburg R. Co.* (1879) 3 Hughes 307; 941.

³⁸ *Hale v. Frost* (1878) 99 U. S. 389, *Skiddy v. Railroad Co.* (1870) 3 Hughes 25 L. ed. 419; *Burnham v. Bowen* 320; (1884) 111 U. S. 776, 28 L. ed. 596;

§ 2756. Juncture at Which Question of Priority Determined.

In determining whether an unsecured claim created prior to the receivership is to be given preference, it is important to consider the conditions under which the question arises and is brought up for final determination. For instance, if the court, upon the appointment of the receiver, authorizes him to pay claims of a certain character, and he acts upon such order, he is protected, and the payment must be ratified, unless of course where the right to reconsider the claim is reserved. On the other hand, if the court authorizes a receiver to pay claims of a certain kind, but does not make it mandatory upon him to make such payment or if, for lack of funds, he is unable to pay them, and the matter comes up for consideration at the final hearing, the court is not concluded by its previous interlocutory order authorizing the payment of the claim, but may consider and determine upon equitable principles the extent of the liability of the property to such claims. Always, where the receiver does not pay a claim, the parties in interest may rightfully challenge its priority, even if it is within the very letter of the order of appointment.³⁹ And as a matter of course where the court has made no previous order authorizing the payment of a claim the question of its priority is to be finally determined in accordance with equitable principles.

*Receiver's Certificates.***§ 2757. Power of Court to Authorize Issuance of Lien Certificates.**

Receiver's certificates are evidences of indebtedness issued by the receiver under the authority of the court of his appointment. They may be issued either in consideration of claims that have already accrued or in consideration of money advanced, work done, or materials furnished, upon the faith of the certificates. They are usually made a first lien on the property.⁴⁰

The power of the court to authorize the issuance of certificates constituting a first lien is merely a manifestation of its general power, already discussed, of creating preferred charges against the property; and of course the issuance of certificates creating a priority over exist-

³⁹ Louisville etc. R. Co. v. Wilson 2 Dill. 448; Montreal Bank v. Thayer (1881) 138 U. S. 508, 24 L. ed. 1025. (1881) 7 Fed. 622; Union Trust Co. v.

⁴⁰ Shaw v. Little Rock etc. R. Co. Chicago etc. R. Co. (1881) 7 Fed. 512; (1879) 100 U. S. 605, 25 L. ed. 757; Credit Company v. Arkansas etc. R. Co. Kennedy v. St. Paul etc. R. Co. (1873) (1882) 15 Fed. 40.

ing liens will not be authorized unless the circumstances are sufficient to justify a preference.

Mercantile Trust Co. v. Kanawha etc. R. Co. (C. C. A.; 1893) 7 C. C. A. 3, 58 Fed. 6: Judge Taft expounded the principle upon which the court acts in authorizing the issuance of receiver's certificates in the following words: "A court of equity which, in foreclosure or other suit, has taken into its custody railroad property, may authorize its receivers to borrow money for the preservation, maintenance, or necessary betterment of the road, and may, by its order, make the loans thus incurred a paramount lien on the income and corpus. The court does not act as the agent for the parties in the sense that it creates the lien by contract of the parties with the lenders, but by virtue of its custody of the property and its jurisdiction of the parties, it pledges its own faith to the lender that it will enforce such a lien against the property and the parties, as a condition of its releasing the property and of its enforcing any equities in favor of any of those who invoke its assistance."

A court appointing a receiver has no power to authorize the issuance of receiver's certificates which shall constitute an absolute lien on the property superior to that of one who is not a party to the suit.⁴¹ But if it is feasible to bring such parties in and they are brought in, the court may then determine whether the certificates previously issued and declared to be a first lien shall be allowed priority or deprived of it.⁴²

§ 2758. Validity and Character of Certificates as Affected by Order.

The validity of receiver's certificates depends on and is governed by the authority under which the certificates are issued. The receivers cannot give to the certificates the character and quality of commercial paper, so as to make them good in the hands of any *bona fide* purchaser without reference to the terms of the order under which they were issued. Receiver's certificates are not negotiable instruments in the technical sense.⁴³ Where a court authorizes the use of certificates for a particular purpose, and the receiver applies them to debts of different character, a general creditor who takes them under such conditions is entitled to no priority over other general creditors.⁴⁴ Even a subsequent innocent purchaser for value does not get an

⁴¹ *Metropolitan Trust Co. v. Lake* price below which they are not to be marketed, a purchaser paying less than etc. R. Co. (1900) 100 Fed. 897.

⁴² See *Hervey v. Illinois Midland R. Co.* (1884) 28 Fed. 169, 176. that sum can enforce them only to the extent of the sum actually paid by him

⁴³ *Union Trust Co. of New York v. Chicago etc. R. Co.* (1881) 7 Fed. 513. with interest. *Stanton v. Alabama etc.*

⁴⁴ *Fidelity etc. Co. v. Shenandoah Iron Co.* (1889) 42 Fed. 372. Where the order authorizing the sale of receiver's certificates names an upset

indefeasible title. He takes strictly subject to the order of the court authorizing the certificates and is chargeable with notice of any defect in the title of those from whom the certificates are obtained.

Central Nat. Bank v. Hazard (1887) 30 Fed. 484: A receiver collusively negotiated certificates to one C. at a considerably lower price than they should have brought, with the result that less was realized for the benefit of the trust than should have been realized. C. negotiated the certificates to innocent purchasers for value. It was held that these holders could enforce the certificates only to the extent of the value paid by C. Said the court: "Receiver's certificates are not commercial paper, and the holder takes them subject to all equities between the original parties, even though he acquires them for value and without notice; and when they are negotiated at a discount, which the receiver is not authorized to allow, a *bona fide* holder will only be protected to the amount actually advanced by the first purchaser."

§ 2759. Order Allowing Sale of Certificates at Reasonable Discount.

It is within the competence of a federal court of equity, upon authorizing a receiver to issue certificates, to allow him to dispose of them at such reasonable discount as may be necessary under the particular circumstances to enable him to obtain the money upon them. In a case where the order of the court below authorized the certificates to be sold at not more than ten per cent. discount, and there was nothing in the record to show that the money could have been raised without such a provision being inserted, the supreme court allowed the certificates to be paid in full with interest, notwithstanding the fact that they had been sold at the discount mentioned. It must be presumed, said the court, that the parties taking the certificates relied on the promise to pay their face, and would not otherwise have trusted the receiver or the fund.⁴⁵ But in a case where the receiver had *hypothecated* certificates, without express authority contained in the order under which the certificates were allowed to be issued, at a discount of ten per cent., the person advancing money to the extent of ninety cents on the dollar was not allowed to be paid to the extent of the full face value with interest, but was limited to the amount actually advanced, with interest.⁴⁶

§ 2760. Same—Effect of State Usury Law.

In allowing receiver's certificates to be disposed of at a discount, the federal courts appear not to be bound by the usury laws of the

⁴⁵ *Union Trust Co. v. Illinois Mid-land R. Co.* (1886) 117 U. S. 434, 29 L. ed. 256, ed. 963. ⁴⁶ *Swann v. Clark* (1894) 110 U. S. 28 L. ed. 256.

respective states of the Union;⁴⁷ but unusual and unnecessary discounts are recognized as improper, and a person who takes receiver's certificates at an abnormal discount would certainly be held not to be an innocent purchaser to the full extent of their face value.⁴⁸

§ 2761. Petition of Receiver for Leave to Issue Certificates.

The consent of a court to the issuance of receiver's certificates is usually obtained upon petition of the receiver,⁴⁹ though the order is not infrequently granted simultaneously with the appointment of the receiver.⁵⁰ In his petition for leave to issue certificates the receiver should make a detailed statement specifying the sums needed, and for what they are needed; and clear proof should be adduced of the correctness of the statement, and of the necessity that the money be raised. A receiver is required upon the final presentation of his accounts, to state clearly the various items; and in like manner, when he asks authority to create in advance a debt against the property by which money is to be put into his hands, he ought to show good reasons why the application should be granted.⁵¹

§ 2762. Notice of Application—Effect of Want of Notice.

Upon application for leave to issue receiver's certificates that shall constitute a first lien on the property, the bondholders, general creditors, and other persons having an interest to be affected thereby, should be given due notice in order that they may have an opportunity to appear and be heard. It does not follow from this that the court cannot grant leave for the issuance of such certificates on an *ex parte* application of the receiver, for it has been held that it has such power.⁵² But in a case where no such notice is given and the order is made *ex parte*, the court has the power subsequently, upon hearing all the parties, to modify the order and to deprive those certificates of their priority. Every purchaser of such certificates therefore assumes

⁴⁷ *Stanton v. Alabama etc. R. Co.* 339; and no doubt at this time such an (1875) 2 Woods 506, with which *com-* abnormal discount would not be toler-
Meyer v. Johnston (1875) 53 Ala. *ated or authorized in a federal court.* 237, 351.

⁴⁸ *In Southerland v. Lake Superior Ship etc. Co.* (1872) MS., the receiver was authorized to dispose of his certificates at a discount not exceeding twenty-five per cent. This order has been criticized as an abuse of the usury laws (*Meyer v. Johnston* (1875) 53 Ala. 250, *Kennedy v. St. Paul etc. R. Co.* (1873) 2 Dall. 448, 459. *Mercantile Trust Co. v. Kanawha* (*Meyer v. Johnston* (1875) 53 Ala. etc. R. Co. (1892) 50 Fed. 874.

the risk of the final action of the court touching their right to priority.⁵³

Laughlin v. U. S. Rolling-Stock Co. (1894) 64 Fed. 25: Certificates issued upon an *ex parte* application were turned over to creditors in satisfaction of claims accruing prior to the receivership for goods sold to the company in the ordinary course of business, for money loaned to it, for salaries of its officers, and for counsel fees. The court in finally passing upon the certificates refused to give them a preferential lien and put them on the same footing as other unsecured claims.

§ 2763. Consent and Estoppel as Affecting Validity of Certificates.

A plaintiff who consents to the issuance of receiver's certificates that shall be a first lien thereby postpones his own lien to that of the certificates, although there are others in the same class who do not consent and who are therefore not postponed.⁵⁴ Likewise a party who, pending the proceedings, stands by and sees obligations incurred and expenditures made under an order of court authorizing certificates to be issued, without making objection, is precluded from afterwards questioning the preference of the certificates.⁵⁵

§ 2764. Application of Proceeds of Certificates.

Parties who actually advance money to a receiver on his certificates, the issuance of the same being duly authorized by the court, are not bound to see that the funds thus put into the hands of the receiver are properly applied.⁵⁶ But before receiver's certificates can constitute a valid charge on the funds or property in the hands of the receiver, the proceeds must come to his hands, custody, or control. It is not necessary that the actual money should be turned over to him. It is enough if credit is entered to his account at a bank with his approval. The subsequent failure of the bank in such a case and the consequent loss of the funds by him does not defeat the lien of the certificates.⁵⁷

⁵³ *Union Trust Co. v. Illinois etc. R. Co.* (1882) 106 U. S. 286, 1 Sup. Ct. Co. (1886) 117 U. S. 434, 460, 6 Sup. 140, 27 L. ed. 117; *Central Trust Co. v. Ct. 809*, 29 L. ed. 963, 972; *Mercantile Marietta etc. R. Co.* (C. C. A.; 1890) Trust Co. v. Kanawha etc. R. Co. (C. 75 Fed. 193, 209, 21 C. C. A. 291. C. A.; 1893) 58 Fed. 6, 17, 7 C. C. A. 3; ⁵⁵ *Union Trust Co. v. Illinois Mid-Meyer v. Johnston* (1875) 53 Ala. 849. ⁵⁶ *Union Trust Co. v. Illinois Mid-Meyer v. Johnston* (1875) 53 Ala. 849. ⁵⁷ *Union Trust Co. v. Illinois Mid-Meyer v. Johnston* (1875) 53 Ala. 849. ⁵⁸ *Union Trust Co. v. Illinois Mid-Meyer v. Johnston* (1875) 53 Ala. 849.

⁵⁴ *Doe v. Northwestern etc. Co.* ed. 963; *Stanton v. Alabama etc. R. Co.* (1896) 78 Fed. 62. *Compare Farmers' Loan etc. Co. v. Centralia etc. R. Co.* (1896) 78 Fed. 62. *Compare Farmers' Loan etc. Co. v. Centralia etc. R. Co.* (1896) 78 Fed. 62. ⁵⁶ *Alabama Iron & R. Co. v. Anniston Loan & Trust Co.* (C. C. A.; 1893) 57 Fed. 25, 6 C. C. A. 242.

⁵⁵ *Miltenberger v. Logansport etc. R.*

§ 2765. Strict Construction of Orders Authorizing Certificates.

Orders authorizing the issuance of receiver's certificates that shall constitute a prior lien are to be strictly construed, and the certificates cannot be used for any purpose other than that specified by the court. An order authorizing the issuance of receiver's certificates to raise money does not authorize the issuance of certificates in consideration of services already rendered or advances already made.⁵⁸ Under an order authorizing certificates to be issued to pay wages, a certificate cannot properly be issued to pay a store account, although this store account represents indebtedness due by reason of goods sold to employees on wage orders.⁵⁹

An order authorizing a railroad receiver to let a contract for building and equipping a line of road for which he is to pay by delivering his certificates to the contractor at a stated rate per mile as the road is finished does not contemplate the creation of a lien in favor of persons who furnish work or supplies to the contractor. In the absence of statute such creditors of the contractor must look exclusively to him for payment.⁶⁰

§ 2766. Liability of Receiver for Misrepresentation.

A receiver who puts upon the market certificates containing a fraudulent misrepresentation to the effect they were issued in pursuance of an order of the court, that they constitute a first lien on the property, and that they were given for iron rails furnished for constructing the road, is personally liable in an action of deceit to any innocent purchaser who is damaged by such false representation.⁶¹

§ 2767. Priority of Certificates of Different Series.

Where a court that has previously authorized the issuance of a series of certificates constituting a first lien on the property finds it necessary to authorize a second series, it is not proper to give the second series priority over the first, without the consent of the holders of the prior certificates. Both series should as a rule be permitted to share equally.⁶² But in determining the priority, as between themselves, of claims represented by different series of receiver's certifi-

⁵⁸ *Stanton v. Alabama etc. R. Co.* ⁶¹ *Bank of Montreal v. Thayer* (1881) (1887) 31 Fed. 585. 7 Fed. 622.

⁵⁹ *Fidelity Ins. etc. Co. v. Shenandoah Iron Co.* (1889) 42 Fed. 372. ⁶² *Bibber-White Co. v. White River etc. R. Co.* (C. C. A.; 1902) 115 Fed.

⁶⁰ *Denison etc. R. Co. r. Ranney-Alton etc. Co.* (C. C. A.; 1900) 104 Fed. 595, 44 C. C. A. 65. 786, 53 C. C. A. 282.

cates, it is sometimes important to distinguish between certificates issued for the purpose of paying off prior indebtedness incurred before the appointment of the receiver and those incurred by the court itself (or under its express direction) while the property is in the hands of the receiver. The latter are, or may be, given precedence over the former.⁶³ The circumstance that certificates are applied to the payment of pre-existing debts deprives them of the right to share equally with certificates used to secure advancements or to pay debts created by the court.

Bank of Commerce v. Central etc. Coke Co. (C. C. A.; 1902) 115 Fed. 878, 53 C. C. A. 334: Certificates of class B were issued to pay debts of a road for labor, materials, and supplies prior to the appointment, and these certificates were made a lien superior to the lien of the mortgage in suit. Certificates of class A were issued to raise money for improvements and repairs authorized by the court and also for taxes. These certificates were likewise made a lien superior to the mortgage debt. The order, however, was silent as to which class of certificates should have priority as between themselves. In finally disposing of the fund, the court ordered that the A certificates were to be given preference over B certificates. Said the court: "Debts contracted by the railroad company on its credit, although they belong to the class called 'preferential,' do not rank on the same high plane with debts contracted by the court on its credit; and, where the property or fund in the custody and control of the court is not adequate to pay both classes, preference will be given to the debts contracted by the court. The obligation of the railroad company to pay its debts is not affected by the receivership and foreclosure. It retains its corporate existence, and its creditors may still pursue it, and in some cases its officers and stockholders. But it is not so with the debts contracted by the court. They are not debts of the railroad company, and the company is not liable for them. The court alone is liable for its debts. That obligation imposes on the court the duty to apply the property or its proceeds in its custody and control to the payment of the debts contracted by it in and about the management of the property. Judicial repudiation of obligations is not to be sanctioned under any conditions. One of the chief duties of courts of justice is to compel delinquent debtors to pay their debts. It could do this with poor grace indeed if it neglected to pay its own debts when it had the means to do so."

§ 2768. Estoppel of Purchaser to Question Validity of Certificates.

A purchaser of property at a foreclosure sale is estopped from questioning the validity of receiver's certificates when they have been adjudged by the court to be a valid lien and the sale is expressly made subject to such incumbrance.⁶⁴ If the certificates are not valid the

⁶³ *Mercantile Trust Co. v. Farmers' Loan etc. Co. v. Stuttgart etc. R. Co. etc. Co.* (1897) 81 Fed. 254, 26 C. C. A. (1901) 108 Fed. 565.
⁶³ 383; *Bank v. Ewing* (C. C. A.; 1900) ⁶⁴ *Central Trust Co. v. Sheffield etc.* 103 Fed. 168, 43 C. C. A. 150; *Farmers' R. Co.* (1890) 44 Fed. 526. In *Swann v.*

question should be raised by those entitled to the proceeds of the sale, not by the purchaser, for presumably he obtained the property at a price based on the theory that the lien of the certificates was valid. A similar estoppel of the purchaser arises from a clause in his deed expressly making the conveyance subject to the payment of the certificates.⁶⁵

§ 2769. *Means of Enforcing Lien of Certificates.*

A court may enforce the lien created by it in favor of receiver's certificates in either of two ways: (1) It may directly order the payment of the loan represented by the certificate out of the proceeds of the sale; or (2) it may impose a continuing lien on the property by providing in the decree of sale that the purchaser shall take the property subject to such a lien. If the latter method is followed, a lien is thereby established by contract with the purchaser in favor of the certificate. This lien, appearing in the chain of title by which the purchaser holds, is attached to the property in the hands of all subsequent grantees of the purchaser, and may, of course, be enforced by the holder of the certificate in an independent action. But where the record, and especially the final decree and the deed executed in pursuance thereof, shows a manifest intention on the part of the court to vest in the purchaser a title free from all incumbrances, the holder of certificates cannot follow the property and enforce the lien on the same in the hands of the purchaser. He must look to the fund representing the proceeds of the sale. And the circumstance that the purchaser may have paid a large part of the purchase price by cancelling the mortgage debt instead of by paying money, does not necessarily change the rule.⁶⁶

The question whether the lien of receiver's certificates is transferred, on a sale of the property, to the fund representing the proceeds of the sale or whether, on the other hand, the lien follows the property itself into the hands of the purchaser, depends primarily on

Wright's Ex'ts (1884) 110 U. S. 590, 4 even upon the ground of concealment Sup. Ct. 235, 28 L. ed. 262, a decree in and fraud subsequently discovered, by a mortgage foreclosure provided that which, as was alleged, the decree had the sale of the mortgaged property been obtained. should be made subject to the payment "Central Nat. Bank v. Hazard of all receiver's certificates which had (1887) 30 Fed. 484. See Gordon v. New- been established as valid by prior de- man (C. C. A.; 1894) 62 Fed. 688, 10 crees in the suit or by that decree, and C. C. A. 587. It was held that the purchaser at the "Mercantile Trust Co. v. Kanawha sale could not contest the lien of certifi- etc. R. Co. (C. C. A.; 1893) 58 Fed. 6. cates, the validity of which had been 7 C. C. A. 3, reversing (1892) 50 Fed. established by an interlocutory decree, 874.

the terms of the contemporaneous decrees or orders of the court. But if these are silent on that point, reference may be had for the solution of this problem to the general situation and state of the case.⁶⁷ Receiver's certificates constitute no lien on the property in the hands of the purchaser at the receiver's sale where the order of sale contemplates that the sale shall be free from liens and that the certificates shall be a charge on the proceeds of the sale only.⁶⁸

§ 2770. When Formal Intervention by Holder of Certificates Unnecessary.

A formal intervention is not necessary in receivership proceedings in order to enable the holder of certificates, issued under the authority of the court to pay off indebtedness contracted by the court, to enforce the same. The preferential character of such certificates is established by the order of the court directing the receiver to contract the debt and issue the certificates. A debt thus contracted is in effect an audited claim from the beginning, and the court should provide for the payment of it without being moved thereto by any formal proceedings.⁵⁹

§ 2771. Effect of Undue Delay in Presentation of Certificates.

But the holder of receiver's certificates is put upon inquiry as to the proceedings that take place in the receivership suit, and if he unduly delays the presentation of his claim and fails to call the attention of the court thereto until the receivership is discharged, the property turned over to the purchaser, and the fund distributed, he will be precluded by his laches from thereafter enforcing the claim. Receiver's certificates are not to be considered to be so far of the nature of call loans that the holder of the certificates may safely await notification of the time when the money is to be paid. He is bound to see that his claim is properly and timely presented.⁷⁰

⁶⁷ *Mercantile Trust Co. v. Kanawha etc. R. Co.* (1892) 50 Fed. 874. But note that, on the particular facts, this case was reversed in (*C. C. A.*; 1893) 58 Fed. 6, 16, 7 *C. C. A.* 3.

⁶⁸ *Bank of Commerce v. Central etc. Coke Co.* (*C. C. A.*; 1902) 115 Fed. 878, 881, 53 *C. C. A.* 334.

⁷⁰ *Mercantile Trust Co. v. Kanawha etc. R. Co.* (*C. C. A.*; 1893) 58 Fed. 6, 7.

Fed. 6, 16, 7 C. C. A. 3. etc. R. Co. (C. C. A.; 1893) 58 Fed. 6, 7
Appeal of Columbus etc. Co. C. C. A. 3, reversing (1892) 50 Fed.
(1901) 109 Fed. 177, 48 C. C. A. 275; 874, 878.
Gordon v. Newman (C. C. A.; 1894) 62

Gordon v. Newman (C. C. A.; 1894) 62 Fed. 686, 10 C. C. A. 587.
E. B. & Co., Vol. 101

Eq. Pract. Vol. -101.

CHAPTER LXVII.

RECEIVERS (*continued*).

Compensation and Expenses of Receiver.

In General:

- § 2772. Amount of Compensation Determined by Court.
- 2773. Compensation and Expenses Chargeable against Fund.
- 2774. Compensation of Master Passing on Receiver's Accounts.
- 2775. When Compensation of Receiver Chargeable to Plaintiff.
- 2776. Apportionment of Expenses among Different Funds.
- 2777. Revival of Judgment for Receiver's Compensation.

Amount of Compensation.

- 2778. Discretion of Lower Court as to Amount of Receiver's Compensation.
- 2779. When Conventional Allowance of Five Per Cent. Proper.
- 2780. Considerations Affecting Amount of Allowance.
- 2781. Notice of Motion to Fix Receiver's Compensation.
- 2782. Preliminary and Final Allowances to Receiver.
- 2783. Occasional Allowances Supplemental to Salary.
- 2784. Compensation for Services Not Contemplated in Appointment.
- 2785. Failure of Party to Question Amount of Salary in Due Time.
- 2786. Effect of Agreement to Waive Compensation.
- 2787. Forfeiture of Compensation for Unfaithfulness.

Removal of Receiver.

- 2788. Circumstances Justifying Removal of Receiver.
- 2789. Application for Removal of Receiver.
- 2790. Sufficiency of Charges Contained in Application.
- 2791. Burden of Proof.
- 2792. Reference to Ascertain Truth of Charges against Receiver.
- 2793. No Appeal by Receiver from Order of Removal.

Discharge of Receivership.

a. Interlocutory Discharge:

- 2794. Temporary Character of Receivership Proceedings.
- 2795. Interlocutory Order for Discharge of Receiver.
- 2796. Application for Discharge of Receiver.
- 2797. Equitable Terms Incident to Discharge of Receiver.
- 2798. Restoration of Receivership.
- 2799. Discretion of Court in Discharging Receiver—Appeal.
- 2800. Discharge of Receiver Pending Suit against Him.

b. Final Discharge of Receiver:

- § 2801. Effect of Final Discharge on Liability of Receiver.
- 2802. Reservation in Favor of Claims Subsequently Established.
- 2803. Implied Assumption of Obligation by Successor.

Receiver's Right of Appeal in Receivership Cause.

- 2804. Appeal from Order or Decree Affecting Receiver Personally.
- 2805. Appeal from Decree Affecting Rights of Parties.
- 2806. Appeal from Decree Affecting Trust Estate.

Action on Receiver's Bond.

- 2807. Liability on Bond Unaffected by Irregularities in Receivership Cause.
- 2808. Proceedings to Enforce Receiver's Bond.

*Compensation and Expenses of Receiver.**In General.***§ 2772. Amount of Compensation Determined by Court.**

A receiver is entitled to a reasonable compensation for his services; and in the absence of legislation regulating his salary or the compensation to be paid, the amount to be allowed is to be determined by the court in which the receivership proceedings are pending. The power of such court to fix the compensation of the receiver is a necessary consequence of the relation that the receiver sustains to the court.¹

In a removal cause the federal court may compensate a receiver for services rendered in his capacity as receiver under the orders of the state court in that case prior to removal, but it will not allow him compensation for services rendered as receiver in a state court in a different suit over which the receivership proceedings in the state court had been extended, but which was not removed.²

§ 2773. Compensation and Expenses Chargeable against Fund.

The expenses of the receivership, including the compensation of the receiver, are not considered a proper charge against either litigant, in the first instance, and they are not ordinarily imposed on either party, as are the ordinary costs of a suit. The expenses of the receivership constitute a proper charge against the property or fund committed to the keeping of the receiver; and a receiver's right to be paid from the fund is not defeated by the circumstance that the plaintiff is beaten in the suit,³ or even that the receiver was erroneously

¹ *Stuart v. Boulware* (1890) 133 U.S. 78, 82, 33 L. ed. 588, 570. ² *Elk Fork Oil & Gas Co. v. Jennings* (1898) 90 Fed. 767.

³ *In re Hinckley* (1890) 3 Fed. 556.

appointed upon a bill that failed to show a cause of equitable cognizance.⁴ The proper expenses of a receivership should never be taxed as costs against the losing party, if the appointment of the receiver was proper and legal and was made by the court in the exercise of its rightful jurisdiction; that is, of course, where the fund in the receiver's hands is sufficient to pay the expenses.⁵

§ 2774. Compensation of Master Passing on Receiver's Accounts.

The compensation of the master who passes on the accounts of a receiver is chargeable to the fund in the receiver's hands; and if the property has been turned over before the allowance is made, it may be charged upon the property. The same is true of the allowance made to the receiver's attorney.⁶

§ 2775. When Compensation of Receiver Chargeable to Plaintiff.

The expense of a receivership may be charged to the share of one or more of the parties in interest rather than to the entire fund, where a contract made between the parties prior to the receivership makes it proper for some to bear all of the expenses.⁷ In a case where the order granting a receiver was highly injurious and there was practically no basis for the suit, the plaintiff was charged with the expenses.⁸ The same will be done where the appointment of the receiver is beyond the competency of the court.⁹

If the property committed to a receiver fails to realize enough to pay the expenses of the receivership proceedings, the right course is to go against the plaintiff who procured the appointment of the receiver. The court has ample authority to charge the expenses of the receivership to him. Nor does it lose jurisdiction over him in this respect by passing a decree confirming the sale, where such decree pretermits the question of costs and expenses to a later stage of the cause and expressly retains jurisdiction of that matter. The authority

⁴ Clark *v.* Brown (1902) 57 C. C. A. R. Co. (C. C. A.; 1899) 93 Fed. 35 76, 119 Fed. 130.

⁵ Ferguson *v.* Dent (1891) 46 Fed. 88, 98. As to the considerations governing the compensation of masters in chancery, see, *ante*, § 1468.

Neither the receiver nor his counsel is entitled to an allowance out of assets that were pledged to another prior to the appointment of the receiver and which have not come to his hand and in respect to which he has done nothing. Girard Trust Co. *v.* McKinley-Lanning L. etc. Co. (1906) 143 Fed. 355.

⁶ Pennsylvania Co. *v.* Jacksonville etc.

⁷ Rosenthal *v.* McGraw (C. C. A.; 1905) 71 C. C. A. 277, 138 Fed. 721.

⁸ Harrington *v.* Union Oil Co. (1906) 144 Fed. 235. See *In re Lacov* (C. C. A.; 1905) 74 C. C. A. 130, 142 Fed. 960.

⁹ Couper *v.* Shirley (C. C. A.; 1896) 21 C. C. A. 288, 75 Fed. 168.

of the court in this respect is not limited to cases where at the outset it has required the plaintiff, as a condition of the appointment of a receiver, to undertake to be liable for the expenses.¹⁰

§ 2776. Apportionment of Expenses among Different Funds.

Expenses chargeable to the receivership property should be equitably apportioned among the different funds or among the different pieces of property. For instance, where some of the property over which the receivership had originally extended had been surrendered at a certain stage of the proceeding, it was held that expenses that had been incurred prior thereto should be partly imposed on the property so surrendered.¹¹

§ 2777. Revival of Judgment for Receiver's Compensation.

Where a personal judgment has been entered in the receiver's lifetime in his favor for his compensation and allowances for administering the receivership, and no one has been appointed as his successor in the trust, the suit may be revived, at least as to such claim, in the name of his representative, he having died pending the appeal.¹²

Amount of Compensation.

§ 2778. Discretion of Lower Court as to Amount of Receiver's Compensation.

The amount of compensation to be allowed to the receiver is a matter largely within the discretion of the court appointing the receiver.¹³ The appellate courts are loath to interfere with the exercise, by the court of first instance, of the discretionary power involved in fixing the compensation of the receiver and in making allowances for services rendered to him by counsel. The lower court has, or is supposed to have, better knowledge than the appellate court can have

¹⁰ Chapman v. Atlantic Trust Co. (C. A.; 1902) 56 C. C. A. 61, 119 Fed. 257; Atlantic Trust Co. v. Chapman (C. A.; 1906) 76 C. C. A. 396, 145 Fed. 560, 68 Fed. 421.

¹¹ Pennsylvania Co. v. Jacksonville etc. R. Co. (C. C. A.; 1895) 13 C. C. A. 550, 68 Fed. 421.

¹² As to when the receiver's allowance is chargeable against general and special funds in his hands, see Girard Trust Co. v. McKinley-Lanning L. etc. Co. (1906) 143 Fed. 355.

¹³ Cake v. Mohun (1896) 184 U. S. 311, 41 L. ed. 447, 17 Sup. Ct. 100.

¹⁴ Hinckley v. Gilman etc. R. Co. (1879) 100 U. S. 153, 25 L. ed. 591; Gaines v. Mills (C. C. A.; 1893) 13 U. S. App. 229, 4 C. C. A. 521, 54 Fed. 614, 617;

Northern Ala. R. Co. v. Hopkins (C. C. A.; 1898) 31 C. C. A. 94, 87 Fed. 509.

It has been observed that the courts of first instance are not prone to make allowances that are too small. Braman v. Farmers' Loan etc. Co. (C. C. A.; 1902) 51 C. C. A. 644, 114 Fed. 20.

of the services actually bestowed and it has better means of determining the value of those services. As a consequence the action of the lower court on this question will be modified or reversed only in a case of an actual abuse of discretion or where the allowance is manifestly excessive or too small.¹⁴

1. *Cake v. Mohun* (1896) 164 U. S. 311, 41 L. ed. 447: The supreme court here thought that the allowance fixed by the lower court for the compensation of the receiver was over-liberal and said that, if it had been an original question, the allowance would have been made considerably smaller. Nevertheless, in view of the fact that there was evidence strongly tending to show that the compensation was just, and in view of the fact that the claim had been successively approved by the auditor, court, and the court of appeals below, the supreme court refused to disturb it. Ten per cent. was here allowed on the receipts of the business.

2. *Wilkinson v. Washington Trust Co.* (C. C. A.; 1900) 42 C. C. A. 141, 102 Fed. 28, 31: Discussing the discretionary authority of the court of equity to fix the compensation of its receiver, Sanborn, Circuit Judge, observed: "In the administration of a trust by a court through its receiver, the chancellor, who appoints, supervises, and directs his action, necessarily knows, better than any record can teach an appellate court, what his appointee has done, and what is a just and reasonable compensation for his services. His allowances of this character ought to be, and are, largely discretionary with the chancellor, and they should not be disturbed unless there has been a manifest disregard of right and reason."

3. *Drey v. Watson* (C. C. A.; 1906) 71 C. C. A. 158, 138 Fed. 792: Though expressing reluctance to interfere with the discretion of the court of first instance, the court of appeals nevertheless set aside an order fixing the compensation of a receiver and his attorney on the ground that the amount allowed was excessive. It was observed that when property is put into the hands of a receiver "its administration should be conducted in the same way, and the same rules of prudence and economy should be observed by the receiver, that obtain in the management and control of the private interests of individuals."

4. *Boston Safe-Deposit etc. Co. v. Chamberlain* (C. C. A.; 1895) 66 Fed. 847, 14 C. C. A. 363: In cutting down the allowances made by the lower court to the receiver and his counsel, the court of appeals of the fourth circuit expressed reluctance in so doing but added: "It is important that the circuit courts of appeals should endeavor in their respective circuits to bring about as much uniformity in such allowances as the cases will admit of. Such services, under some peculiar circumstances, or by agreement of the parties before the court, or upon *ex parte* applications, have often been, in many courts of this country, so extravagantly compensated that we think there has been a tendency to establish a standard of compensation in matters connected with railroad foreclosures which

¹⁴ *Trustees v. Greenough* (1882) 105 12 C. C. A. 215, 64 Fed. 450; *Trust Co. U. S.* 527, 537, 26 L. ed. 1157, 1162; *v. McClure* (1897) 24 C. C. A. 64, 78 *Stuart v. Boulware* (1890) 133 U. S. Fed. 209; *Braman v. Farmers' etc. Co.* 78, 82, 10 Sup. Ct. 242, 33 L. ed. 568, (C. C. A.; 1902) 114 Fed. 18, 51 C. C. 570; *Whitney v. New Orleans* (1893) A. 644; *In re Michigan Cent. R. Co.* 4 C. C. A. 521, 54 Fed. 614; *Southern* (C. C. A.; 1903) 59 C. C. A. 643, 124 *Cal. etc. Co. v. Union etc. Co.* (1894) Fed. 727, 733.

is unreasonably liberal as compared with similar services in any other employment or with respect to any other subject-matter."

§ 2779. When Conventional Allowance of Five Per Cent. Proper.

Where a small fund is administered the usual compensation of five per cent. allowed to accountants¹⁵ is considered to be proper compensation for the receiver.¹⁶ But this rule is not inflexible, and a less sum or a greater¹⁷ may be allowed if the particular service rendered makes it proper. Where large sums pass through the receiver's hands the five per cent. rule would lead to excessive allowances, and consequently in such cases the receiver is given a salary or is paid such round sum as the conditions seem to warrant.¹⁸

§ 2780. Considerations Affecting Amount of Allowance.

The question of the amount of compensation of a receiver is to be determined on equitable principles,¹⁹ with a due regard to the value and utility of the services rendered and to the degree of responsibility involved.²⁰ The circumstance that a receiver has raised a large sum of money on his personal guaranty and used it for the purposes of the trust should be taken into account in fixing his compensation.²¹ The compensation of the receiver is not necessarily to be measured by the amount which, after the work is done, it appears that another person would have been willing to do the work for. The receiver's office is not put up at auction, and his compensation is not determined on that principle. The court selects a competent and trustworthy person, and he is to be paid a just compensation under all the circumstances.²² The action of the court should neither be tinged with parsimony nor characterized by extravagance.²³

Exceptional energy and vigilance on the part of a receiver may be a good ground for liberal compensation.²⁴ But it has been held that the circumstance that a receiver has been able to introduce economies into the administration of the trust, as for instance, by combining the

¹⁵ *Girard Trust Co. v. McKinley-Lanning etc. Co.* (1906) 143 Fed. 355.

¹⁶ *Drey v. Watson* (C. C. A.; 1905) 71 C. C. A. 158, 138 Fed. 792.

¹⁷ *Cake v. Mohun* (1896) 164 U. S. 311, 41 L. ed. 447, 17 Sup. Ct. 100.

¹⁸ *Wilkinson v. Washington Trust Co.* (C. C. A.; 1900) 102 Fed. 28, 42 C. C. A.

¹⁹ *Drey v. Watson* (C. C. A.; 1905) 71 C. C. A. 158, 138 Fed. 792.

²⁰ *Clark v. Brown* (C. C. A.; 1902) 57 C. C. A. 76, 119 Fed. 130.

²¹ *Petersburg Sav. etc. Co. v. Della-torre* (C. C. A.; 1895) 70 Fed. 643, 17 C. C. A. 310.

²² *Central Trust Co. v. Wabash etc. Woods* 381, Fed. Cas. No. 8,293.

²³ *Braman v. Farmers's Loan etc. Co.* (C. C. A.; 1902) 51 C. C. A. 644, 114 Fed. 18.

²⁴ *Weiss v. Haight & Freese Co.* (1906) 148 Fed. 399, 412.

offices of auditor and cashier, does not entitle him to additional compensation, though the expenses of conducting the business are thereby rendered much less. In reducing expenses to the lowest practicable and proper basis, the receiver does no more than he is under obligation to do.²⁵

The circumstance that the services of a railroad receiver were chiefly rendered in connection with the financing of the road and that he did not have anything to do with its management and operation supplies a good ground for refusing him any compensation in respect to the management of the road.²⁶ The non-resident receiver who does not have immediate charge of the receivership property and who leaves the executive management in other hands is not entitled to compensation as an active executive head.²⁷

It is a proper consideration in fixing the receiver's compensation that he has been well paid as manager and superintendent during the time he was acting as receiver.²⁸ So, after the duties of the receiver as manager have terminated and his responsibility as such has ceased, he may well be paid at a lower rate during the final winding up of the business.²⁹

§ 2781. Notice of Motion to Fix Receiver's Compensation.

As the allowance to a receiver by way of compensation for his service is not subject to the arbitrary determination of the court, the amount of it should be fixed by the court only after notice and upon a hearing, where the parties interested have an opportunity to contest the claim. It is reversible error for the court to pass upon this matter of its own motion, or upon the motion of the receiver, without notice to a party adversely interested.³⁰

§ 2782. Preliminary and Final Allowances to Receiver.

Though a court will, from time to time after the appointment of receiver, make proper interlocutory allowances by way of compensation for the service so far rendered by him, yet it should be

²⁵ Farmers' Loan etc. Co. v. Central Railroad (1881) 8 Fed. 60, 2 McCrary 318.

²⁹ Boston Safe-Deposit etc. Co. v. Chamberlain (C. C. A.; 1895) 66 Fed. 847, 14 C. C. A. 363.

²⁶ Braman v. Farmers' Loan etc. Trust Co. (C. C. A.; 1902) 114 Fed. 18, 51 C. C. A. 644.

³⁰ Ruggles v. Patton (C. C. A.; 1906) 74 C. C. A. 450, 143 Fed. 312; Merchants' Bank v. Crysler (C. C. A.; 1895) 14 C. C. A. 444, 67 Fed. 388.

²⁷ Central Trust Co. v. Cincinnati etc. R. Co. (1892) 58 Fed. 500.

²⁸ Williams v. Morgan (1884) 111 U. S. 684, 28 L. ed. 559, 4 Sup. Ct. 638.

borne in mind that the right time for the final allowance of compensation is at the close of the receivership proceedings. Future contingencies and exigencies, and the character of future administration of the receivership cannot be foreseen in the earlier stages of the proceedings; and hence any final allowance, made before the receiver is practically through with his duties, is premature. The manner in which the receivership is conducted, and the diligence shown in expediting the case are proper elements to be considered in ultimately fixing the compensation, yet these factors cannot be known or appreciated until the case is nearing its end. In fixing the amount of the preliminary allowances or stated salary it has been said that a sound policy requires that such allowances shall be materially less than the value of the services rendered by the receiver prior to the making of such allowances. Such a practice inures to the benefit of creditors and stockholders through its tendency to secure a reasonably prompt settlement of the business and a consequent curtailment of expenses. Besides it furnishes a sort of security for the continued good behavior of the receiver. This practice is particularly desirable where the case is such as to be capable of and to require a speedy termination. The final allowance, made at the close of the receivership, should be so adjusted that the receiver will have fair and just compensation for his services as a whole, prior advances being taken into due consideration.³¹

§ 2783. Occasional Allowances Supplemental to Salary.

The salary granted to a receiver by the court is not infrequently supplemented by other allowances as the occasion and special nature of his services require.³² Thus, if the original salary granted appears to be inadequate or if the receiver is called upon to do things not contemplated when the salary was first determined, additional compensation should be granted. In one case a receiver of a railroad who voluntarily assumed to do the duties of superintendent was allowed pay for the services of superintendent in addition to the salary agreed upon for him as receiver.³³

If a receiver renders services and incurs expenses as receiver during the pendency of an appeal, the appellate court on sending the

³¹ *Maxwell v. Wilmington etc. Co.* (1900) 101 Fed. 933, 42 C. C. A. 91; (1897) 82 Fed. 214; *Merchants' Bank Easton v. Houston etc. R. Co.* (1889) *v. Cryslar* (C. C. A.; 1895) 14 C. C. A. 40 Fed. 189.

³² 444, 67 Fed. 388.

³³ *Farmers' Loan etc. Co. v. Central*

³³ *Dillingham v. Moran* (C. C. A.; R. of Iowa (1881) 8 Fed. 60.

cause back will reserve to him the right to apply to the lower court for compensation in respect to such services and expenses.³⁴

§ 2784. Compensation for Services Not Contemplated in Appointment.

The circumstance that a receiver may have agreed to do the duties of his office at a particular salary does not preclude him from receiving compensation for services not contemplated at the time of the appointment, nor does it prevent the court from giving additional compensation where the agreed amount appears quite inadequate; but such circumstance makes against increases of salary that are not clearly justifiable on the grounds stated.³⁵

§ 2785. Failure of Party to Question Amount of Salary in Due Time.

Where a receiver has been drawing a stated monthly salary by allowance of the court, an interested party who takes no proper steps to question the propriety of the allowance nor to bring the receivership to a close, cannot, after standing by for several years, compel the receiver to return any part of such salary, and this even though the receivership proceedings may appear to have been somewhat unduly prolonged.³⁶

§ 2786. Effect of Agreement to Waive Compensation.

If a receiver contracts a loan in his official capacity and, to secure it, agrees personally that he will not enforce any claim for commissions to the detriment of that obligation, but that the latter shall have precedence, such agreement does not prevent the receiver from receiving his proper commissions out of funds that are of a higher rank than that of the party making the advancement, since the latter could not in any event have recourse to such funds, and hence he is not prejudiced by allowing the commission.³⁷

§ 2787. Forfeiture of Compensation for Unfaithfulness.

Though a receiver may forfeit his right to any compensation whatever by misconduct or fraud in the administration of his trust, the court will not ordinarily visit such a penalty on him unless it is clearly shown that he acted with a corrupt purpose. But he may be

³⁴ *Montgomery v. Petersburg Sav. etc. Co.* (C. C. A.; 1895) 70 Fed. 746, 17 C. 1897) 81 Fed. 759, 26 C. C. A. 596. ³⁶ *Dillingham v. Moran* (C. C. A.; C. A. 380. ³⁷ *Bloomfield v. Roy* (C. C. A.; 1903)

³⁵ *Farmers' Loan etc. Co. v. Central Railroad* (1881) 8 Fed. 63. ³⁸ 120 Fed. 502, 56 C. C. A. 652.

charged with particular items upon final accounting, or his improvident expenditures may be disallowed, wherever he has acted improperly and without due discretion. While error or mistake is thus sufficient to charge him on final account, only deliberate fraud will entirely disentitle him to compensation.³⁸

Removal of Receiver.

§ 2788. Circumstances Justifying Removal of Receiver.

As a receiver is chosen with a view to his fitness for the particular duties that are expected to devolve on him, the court of his appointment has the power to remove him and appoint another in his place whenever his unfitness for the particular duties connected with the receivership becomes apparent, or whenever it appears to be to the best interest of all concerned that a change should be made. The circumstance that a receiver has other interests hostile to the trust is sufficient to require his removal.³⁹ A receiver should be removed if he is shown to be under the control of other interests than those immediately concerned in the receivership.⁴⁰ So a receiver will be removed and superseded where it is made to appear that he was the nominee of one of two hostile parties and that his appointment was due to a mistaken belief that all the interests represented in the suit were united in him.⁴¹ But a receiver appointed to continue the business of a corporation will not be removed in order that another may be appointed merely because the holder of a small minority of the stock so desires, there being no showing of incompetency or of other disqualification in the actual incumbent of the office.⁴²

³⁸ Farmers' Loan etc. Co. v. Central Co. (1893) 58 Fed. 47; Farmers' Loan Railroad (1881) 8 Fed. 60, 65; See etc. Co. v. Northern Pac. R. Co. (1894) Cowdrey v. Railroad Co. (1870) 1 Woods 61 Fed. 546; Farmers' Loan etc. Co. v. Cape Fear etc. R. Co. (1894) 62 Fed. 340.

³⁹ Atkins v. Wabash etc. R. Co. (1886) 675; Bayne v. Brewer Pottery Co. 29 Fed. 161; State Trust Co. v. National (1897) 82 Fed. 391.

Land etc. Co. (1893) 72 Fed. 575. A railroad receiver who is guilty of

⁴⁰ Phinizy v. Augusta etc. R. Co. making intolerable discriminations as (1893) 56 Fed. 273.

⁴¹ Wood v. Oregon Development Co. (1893) 55 Fed. 901. Handy v. Cleveland etc. R. Co. (1887) 31

⁴² Land Title etc. Co. v. Asphalt Co. Fed. 689. In Meier v. Kansas Pac. R. Co. (1878) 5 Dill. 476, Fed. Cas. No. 9,395,

A fair idea of the considerations that control the court of equity in passing on an application for the removal of a receiver will be found in the following additional authorities: Finance Co. v. Charleston etc. R. Co. (1891) 45 they got to quarreling. It appeared Fed. 438; Street v. Maryland Cent. R. moreover that the double receivership

It is no ground for the removal of a railroad receiver that one of his many employees, agents, or servants is guilty of fraud and misconduct, unless the receiver is charged with complicity in such conduct or sanctions it after learning of the same. All that can be demanded of the receiver is the exercise of care in choosing his agents and diligence in looking after them and the business intrusted to them.⁴³

§ 2789. Application for Removal of Receiver.

The party making the application or motion for the removal of a receiver is required to make specific charges, and these must be supported by affidavits or other sufficient proof. The application is addressed to the sound discretion of the court; and if the latter considers that the charges are sufficiently specific and sufficiently grave in their nature to call for further consideration, the receiver will be required to answer. When the answer appears, the court has to determine whether the charges are sufficiently refuted to satisfy the court with respect to the integrity and competency of the officer.⁴⁴

A court of ancillary jurisdiction will not, except perhaps under extraordinary conditions, entertain a petition to remove the receiver on account of his misconduct. Such proceedings should be taken in the court of primary jurisdiction.⁴⁵

§ 2790. Sufficiency of Charges Contained in Application.

If the charges against a receiver are subject to criticism by reason of being indefinite and lacking in precision, the receiver nevertheless technically waives the objection by failing to take exception to them on this ground and by answering to the merits; but the circumstance that the charges are vague, uncertain, and general may properly be considered by the court in determining, in the light of the answer and proof, whether the situation is one that requires further investigation.⁴⁶

was expensive; that the two hostile receivers were a thousand miles apart, and that neither lived within two hundred miles of the road. Both receivers were removed and a single disinterested party living in the state where the road mainly lay was appointed receiver in their stead.

⁴³ Clarke v. Central R. etc. Co. (1893) 66 Fed. 16.

⁴⁴ Farmers' Loan etc. Co. v. Northern Pac. R. Co. (1894) 61 Fed. 546.

⁴⁵ Chattanooga Terminal Ry. Co. v. Felton (1895) 69 Fed. 273.

⁴⁶ Farmers' Loan etc. Co. v. Northern Pac. R. Co. (1894) 61 Fed. 546.

At the hearing of a motion to remove a receiver on grounds of mismanagement and for other reasons, the court looked over certain rebuttal affidavits that had been filed. It appeared that the matter was not properly in rebuttal, but was merely cumulative. The court

§ 2791. Burden of Proof.

A receiver will not be removed except upon a sufficient showing, and the burden is on the party seeking the removal. Unfitness, incompetence, or other good ground must be made to appear. Proof of a mere mistake or indiscretion, more obvious upon retrospection than at the time when the act is done, is not sufficient to justify a removal, especially where it is manifest that no fraud was intended.⁴⁷

§ 2792. Reference to Ascertain Truth of Charges against Receiver.

If the court is not fully satisfied upon the showing made by the respective parties, it may order a reference to take proof either generally touching all the charges of the petition, or in respect to any matters upon which the court desires further information. But such an order of reference is never a matter of course and will be made only when the court sees good reason for making it.⁴⁸

§ 2793. No Appeal by Receiver from Order of Removal.

The action of a court in removing a receiver and substituting another in his stead is an act of judicial discretion, and the receiver who is removed cannot appeal from the order.⁴⁹

*Discharge of Receivership.**a. Interlocutory Discharge.***§ 2794. Temporary Character of Receivership Proceedings.**

As the receivership is a purely auxiliary remedy and intended merely for the conservation of property pending the suit, it follows that a time must come in every such proceeding when the receiver must be discharged and the property surrendered or fund distributed to those entitled. It is the duty of every court of equity in which such a suit is pending to hasten the day when the receiver may be discharged and its own responsibility thereby ended. The continuation of a receivership for long periods of time is reprehensible and

observed that in any ordinary case such affidavits would be rejected, but inasmuch as the matter touched the conduct of an officer of the court, the affidavits might be given such attention as they seemed to deserve. *Fowler v. Jarvis-Conklin etc. Co.* (1894) 66 Fed. 14.

⁴⁸ *Farmers' Loan etc. Co. v. Northern Pac. R. Co.* (1894) 61 Fed. 546.

⁴⁹ *Bosworth v. St. Louis Terminal etc. Ass'n* (1899) 174 U. S. 182, 189, 43 L. ed. 941, 943; *Milwaukee etc. R. Co. v. Souter* (1894) 154 U. S. 541, 17 L. Conklin Mortg. Co. (1894) 63 Fed. 888, ed. 804,

should not be allowed except under the pressure of absolute necessity.⁵⁰ In a case where a railroad company had been in the hands of a receiver for two years, the court thought fit to admonish the parties that if they should not, within a reasonable time, devise some means for ending the receivership, the court would take upon itself of its own motion to consider whether the receivership should not be dissolved.⁵¹ It is not bad practice for the court, upon granting an order for the appointment of a receiver, to make it a condition of the continuation of the receivership that the party prosecuting the suit shall speed the cause with diligence, and that in case of his failure to do so the court will of its own motion discharge the receiver.⁵²

Though the proceedings in a receivership cause should be advanced to a final termination with all reasonable speed, this object will not be permitted to lead the court to a precipitate action that might jeopardize the interests of the parties. Thus a court of equity has refused to order an immediate sale of a railroad in the hands of a receiver where such a transfer of the property would apparently, at that juncture, endanger the right of the road to subsidies granted by local bodies.⁵³

§ 2795. Interlocutory Order for Discharge of Receiver.

The order for the discharge of a receiver may be of an interlocutory nature, or it may be embodied in the decree finally disposing of the cause. Of necessity when the bill itself is dismissed for any reason or when the purpose of the receivership has been fully accomplished, the receiver will be discharged and the proceedings brought to a close. But it often happens that an order discharging the receiver is desirable and proper though the court may still retain the bill for the purpose of granting such relief as the plaintiff may be entitled to. An interlocutory order for the discharge of a receiver will be granted where it appears that he was improvidently appointed or that there is any other sufficient reason for his discharge.⁵⁴ Where, in the course of receivership proceedings, the fact is revealed that the suit was not

⁵⁰ Milwaukee etc. R. Co. v. Soutter (1864) 2 Wall. 510, 17 L. ed. 900.

⁵¹ Platt v. Philadelphia etc. R. Co. (1894) 65 Fed. 872.

⁵² See order of appointment in Dow v. Memphis etc. R. Co. (1884) 20 Fed. 284.

⁵³ Bibber-White Co. v. White River Val. etc. Co. (1901) 110 Fed. 473.

⁵⁴ McHenry v. New York P. & O. R. Co. (1885) 25 Fed. 114 (receiver discharged because it was not shown that the prop-

erty was in jeopardy or needed the protecting control of the court); Walters

v. Anglo-American Mortgage etc. Co. (1892) 50 Fed. 316 (receiver discharged

for general lack of merit in the bill).

If an injunction granted in the same cause appears to be a sufficient protection, the order appointing the receiver may be rescinded. Ford v. Taylor

(1905) 137 Fed. 149.

bona fide brought by the plaintiff in order to assert a right of his own, but was collusively brought in pursuance of an understanding with the debtor and in order to prevent the latter from being harassed by other creditors, the court may, of its own motion, discharge the receiver.⁵⁵

§ 2796. Application for Discharge of Receiver.

To procure an order for the discharge of a receiver *pendente lite* or an order rescinding the act of appointment, the same procedure should be followed as in the case where an order is sought for the dissolution of a temporary injunction. The applicant should proceed by motion or petition, upon notice, and his application should be supported by affidavit, or affidavits, unless the cause for the discharge of the receiver sufficiently appears in the pleadings. The defendant usually puts in a sworn answer and uses the same with the effect of an affidavit at the hearing of the motion. The judge of the court may hear the motion to discharge the receiver at chambers.⁵⁶

§ 2797. Equitable Terms Incident to Discharge of Receiver.

As a condition of the granting of an order for the discharge of a receiver and the surrender of the property to the party from whom it was taken, the court has the power to impose equitable terms. It can, for instance, require the person to whom the property is delivered to execute a bond with good security conditioned for the performance of the terms of an agreement made with the plaintiff. Where such a bond has been given, the court has the power in the same suit to enter a decree on the bond against the surety as well as the principal.⁵⁷

Upon superseding an order appointing a receiver the court has the right and it is usually its duty to direct the receiver to restore the property in his hands to those from whom it was taken.⁵⁸

§ 2798. Restoration of Receivership.

Where a court discharges a receiver it may later reappoint him and authorize the same property to be retaken; but if, between the time of the surrender of the property and the order of reappointment,

⁵⁵ *Sage v. Memphis etc. R. Co.* (1883) (C. C. A.; 1903) 61 C. C. A. 288, 126
⁵ McCrary 643, 18 Fed. 571; *Brassey v. Fed.* 302.

New York etc. R. Co. (1884) 19 Fed. 663 (collusion not sufficiently shown). ⁵⁸ *In re Alexander McKenzie, Petitioner* (1901) 180 U. S. 551, 45 L. ed. 663; *Howard v. La Crosse & M. R. Co.* (1864) Fed. Cas. No. 6,760.

⁵⁶ *Walters v. Anglo-American Mortgage etc. Co.* (1892) 50 Fed. 316.
⁵⁷ *Twin City Power Co. v. Barrett*

another court has stepped in and appointed a receiver for the same property, and its receiver has taken possession, the court that surrendered the property cannot take it back after the reappointment, for the order of the appointment cannot be held to relate back so as to defeat the lawful possession of the second court.⁵⁹

§ 2799. Discretion of Court in Discharging Receiver—Appeal.

The action of the court in passing on an application for the discharge of a receiver is largely discretionary, and an appeal will not lie from an order discharging the receiver.⁶⁰ It is also true that an appeal will not generally lie from an order refusing to discharge a receiver. But it is not always so. The right of a party whose property is withheld to have it restored to him may be so clear as not to admit of doubt; and in such case, the receiver must be discharged, and the court has no discretion to refuse it. Thus in a suit to foreclose a railroad, the property had been put into the hands of a receiver. Subsequently the amount of the indebtedness was ascertained by a decree and the debtor, or a second mortgagee, came forward and asked for a discharge of the receivership, at the same time offering to pay all the indebtedness then due. It appeared that the balance subsequently to become due on the first mortgage debt was amply secured. Under these circumstances the court held that the discharge of the receiver was not discretionary, but was a right that must be granted.⁶¹

§ 2800. Discharge of Receiver Pending Suit against Him.

If a suit is brought against a receiver, the fact that he is discharged during the interval between the trial in the lower court and the hearing on appeal does not affect the validity of the judgment rendered against him in that cause.⁶²

b. Final Discharge of Receiver.

§ 2801. Effect of Final Discharge on Liability of Receiver.

After a receiver has been discharged by an order of the court and the property or fund held by him has been turned over and distributed to the person or persons entitled, no action will lie against

⁵⁹ *Shields v. Coleman* (1895) 157 U.S. 168, 39 L. ed. 660. ⁶¹ *Milwaukee etc. R. Co. v. Soutter* (1864) 2 Wall. 609, 17 L. ed. 886.

⁶⁰ An appeal will lie from an interlocutory order or decree appointing a receiver, but not from an order or decree discharging him. *Act of April 14, 1906*, ch. 1627, 34 Stat. L. 116, ⁶² *McCarley v. McGhee* (1901) 108 Fed. 494,

the receiver in respect of any liability incurred by him as receiver. The plaintiff who has failed to intervene and set up his claim pending the receivership proceedings must follow the property and seek relief against it in the hands of its possessor, provided the decree discharging the receiver reserves such right. If no such reservation is made in the decree, the party complaining is debarred of relief, unless the decree can be amended before the term is ended. After the expiration of the term it is too late to apply for such relief.⁶³ The order of discharge can only be vacated or amended on timely application.⁶⁴

§ 2802. Reservation in Favor of Claims Subsequently Established.

From what has just been stated it follows that in the order discharging a receiver and ordering the property to be turned over to the person entitled thereto, it is always highly important to embody therein a proviso to the effect that the person taking possession is to hold subject to any claims against the receiver that may be adjudicated by the court, and jurisdiction to adjudicate such claims should be expressly reserved; for it not infrequently happens that some claimant or other will turn up who, by some inadvertence or accident, failed to put in his claim against the receiver at the proper time, and it is not just that such persons should be entirely cut off from the right to reach the receivership property,—a result that usually follows unless some such reservation is made. Illustrations of the propriety of the practice in question are found in the following cases.

1. *Ohio Coal Co. v. Whitcomb* (C. C. A.; 1903) 59 C. C. A. 487, 123 Fed. 359: The decree in a receivership suit provided that the purchaser at the receivership sale should satisfy and discharge any unpaid indebtedness or liability of the receiver that had been incurred in the management and operation of the mortgaged premises on or after a stated date, and jurisdiction to carry out this part of the decree was reserved in the court. The property was then ordered to be turned over to the purchaser, which was done. Subsequently a proceeding was brought in the receivership cause to ascertain and liquidate a claim that had accrued pending the receivership. It was held that the proceeding was proper. As to such claim the receivership cause was still pending, and the circumstance

⁶³ *Farmers' Loan etc. Co. v. Central* lien antedating the receivership. *Mas-*
R. Co. (1880) 7 Fed. 537; *Davis v. Dun-* *sachusetts Mut. L. Ins. Co. v. Chicago*
can (1884) 19 Fed. 477. *etc. R. Co.* (1882) 13 Fed. 857, 861,
Where a receiver has been discharged affirmed (1884) 109 U. S. 724, 27 L. ed.
and the property surrendered to a pur- 1089.

chaser at the receiver's sale, the re- ⁶⁴ *Western New York etc. R. Co. v.*
ceiver is not a necessary party to a *Penn Refining Co.* (C. C. A.; 1905)
suit against the purchaser, or one claim- 70 C. C. A. 23, 137 Fed. 343.
ing under the purchaser, to enforce a
Eq. Proc. Vol. —102,

that the active receivership was terminated and that the property had been turned over to the purchaser, was immaterial.

2. *American Bonding etc. Co. v. Baltimore etc. R. Co.* (C. C. A.; 1903) 60 C. C. A. 52, 124 Fed. 866: A receiver had, with the sanction of the court, entered into a contract with a third person for improvements to be made by the latter on the property in the hands of the receiver, and the contractor gave bond with sureties to do the work. The property was sold, and in its decree confirming the sale and directing the property to be delivered to the purchaser, the court ordered the purchaser and his subvendee, being also the assignee of the contract, to carry out and perform that contract, the same being then unfinished. The court also reserved the power to enforce compliance with this order and, to this end, to retake and resell the property. The assignee duly proceeded with performance. The contractor, however, threw up his job. It was held that the assignee could maintain an action against the sureties on the bond.

3. *Baltimore etc. R. Co. v. Burris* (C. C. A.; 1901) 50 C. C. A. 48, 111 Fed. 882: A company that had been in the hands of a receiver was permitted to resume possession and control of its properties on condition that it should assume and satisfy all the obligations and liabilities of the receiver. It was held that an action for personal injury inflicted while the road was in the hands of the receiver, but which action was not brought till the company had resumed possession, should be brought against the company and not against the receiver. The proceeding in this case was by means of an intervening petition against the company, and no proof of the conditional order of the court was offered. But it was held that the court could take judicial knowledge of it without proof, such order having been entered in the main suit to which this was ancillary.

§ 2803. Implied Assumption of Obligation by Successor.

As is indicated above, it is a general rule that one who has a claim or right of action against a receiver in his official capacity and growing out of his management of the property while in his hands cannot ordinarily enforce such claim in a personal action against the individual or corporation who succeeds to the property when the receiver has been discharged, unless the court has expressly fixed the obligation upon such successor as a condition of his right to acquire the property. There is one situation, however, where the courts have permitted an obligation accruing against the receiver to be enforced in a personal action at law against the successor, and this upon the idea of an implied assumption on the part of the successor to satisfy the obligation. The case in which this notion obtained recognition was of the following nature: A railroad had been in the hands of a receiver, but the receiver had been discharged and the property returned to the railroad company, upon its own procurement, or at least with its consent and acquiescence. While the road was in the hands of the receiver large sums were expended by him in improvements and new equipment, so that the road, when returned to the company, was in a far

more valuable condition than before. After the company had regained possession, an action was brought against it for damages incurred by the plaintiff by reason of the negligent operation of the road while in the hands of the receiver. It was held that, though the cause of action was primarily one against the receiver, a suit could be maintained upon such cause of action against the company itself. By accepting the restoration of the road, largely increased in value by the betterments, the company was held to have assumed such valid claims against the receiver as were not satisfied by him or by the court that discharged him; but it was intimated that the company could not be held liable to an extent greater than the value of the betterments in question. The court pointed out that if this had been a controversy between a party whose claim originated while the road was in the control of the receiver and a purchaser at the judicial sale, the action could not have been maintained, unless the decree of sale had expressly charged the purchaser with liability in respect to such claim.⁶⁵

Receiver's Right of Appeal in Receivership Cause.

§ 2804. Appeal from Order or Decree Affecting Receiver Personally.

The receiver's right of appeal from orders or decrees made in the receivership proceedings depends on the nature of the order or decree and on the manner in which it affects the receiver and the other parties. The relation between the court and the receiver is of a peculiar nature, and the receiver cannot as a matter of course appeal from any and every order or decree the court sees fit to make. If an order or decree touches the receiver in his personal rights, and the order is not one exclusively within the discretion of the court, the receiver undoubtedly has the right to appeal. For instance, if the court refuses to allow him commissions or fees, or if at final settlement the court charges him with a particular sum of money and directs it to be paid into the court, the receiver can appeal.⁶⁶ But if the order is altogether discretionary, the receiver cannot appeal, though the order affects him personally. Thus it is settled that the receiver cannot appeal from an order discharging or removing him from the receivership.⁶⁷

⁶⁵ Texas etc. R. Co. v. Bloom (1897) disallowing commission); Hinckley v. 164 U. S. 636, 41 L. ed. 580, 17 Sup. Ct. Gilman etc. R. Co. (1876) 94 U. S. 467, 218, (1894) 9 C. C. A. 300, 60 Fed. 979; 24 L. ed. 133 (order charging receiver Texas etc. R. Co. v. Johnson (1894) 151 with a particular sum of money appealable). U. S. 81, 38 L. ed. 81.

⁶⁶ Bosworth v. St. Louis Terminal ⁶⁷ See Bosworth v. St. Louis Terminal etc. Assoc. (1899) 174 U. S. 189, 43 L. etc. Ass'n (1899) 174 U. S. 187, 43 L. ed. 943 (receiver may appeal from order ed. 943).

§ 2805. Appeal from Decree Affecting Rights of Parties.

It is a rule that the receiver cannot appeal from an order or decree distributing burdens or apportioning rights between the parties to the suit, or distributing the receivership estate among the parties according to their respective interests as decreed by the court. The receiver occupies a position of subordination to the court of his appointment. He is, as is aptly said, merely the hand of the court; and consequently he is devoid of any right, discretion, or authority to dispute an order or decree adjudicating the respective rights of the different parties. In his trust capacity the receiver represents all of the parties, and consequently he is not permitted to become the protagonist of any one as against the other.⁶⁸ So far as concerns the rights of the parties *inter sese*, each must be left to look out for himself.

§ 2806. Appeal from Decree Affecting Trust Estate.

On the other hand, the receiver is allowed to appeal from any order or decree by which the trust fund is depleted or by which any part of it is decreed to a stranger or persons other than those who are parties to the suit and interested as beneficiaries in the trust fund. The receiver, in his official capacity, is the protector of the entire estate, and he is representative of all the beneficiaries who are before the court. It is therefore his duty to protect the trust estate from the claims of strangers. Of course strangers to the suit cannot get into a receivership cause in order to assert a right or claim to the fund, except by means of a petition of intervention; and the principle now under consideration therefore resolves itself into the rule that the receiver, in behalf of the true parties to the suit, can combat the claim of an intervening petitioner, and if the court allows the claim, the receiver may take an appeal. The claim of such an intervenor is antagonistic to the interests of the parties to the suit, and the receiver is a proper person to protect the trust estate against it. The fact that the actual parties may also contest such a claim does not deprive the receiver of the authority or relieve him of the duty to see that the estate is not subjected to an improper charge. It has been held that where the receiver has a right to question the propriety of allowing a claim, his right of appeal does not terminate when the property is taken out of his possession and returned to the control of one of the

⁶⁸ *Bosworth v. St. Louis Terminal etc. Ass'n* (1899) 174 U. S. 182, 43 L. ed. 943.

parties, if any fund or security is retained by the court for the satisfaction of the claim.⁶⁹

A receiver who desires to take an appeal is not required to procure a formal order granting him leave to do so. The mere granting of the appeal, as in case of other suitors, involves the granting of leave to appeal.⁷⁰

Action on Receiver's Bond.

§ 2807. Liability on Bond Unaffected by Irregularities in Receivership Cause.

The validity of a receiver's bond and the liability of the receiver and his sureties thereon are in no wise affected by the circumstance that the appointment of the receiver was improvident or improper, or that the proceedings were irregular. Nay, though the court should afterwards dismiss the bill and discharge the receiver on the ground of a lack of jurisdiction, the bond given by the receiver may still be enforced. All the rights that the receiver has are derived from the court, and his possession is the possession of the court. Hence he and his sureties are estopped from denying the jurisdiction of the court.⁷¹

§ 2808. Proceedings to Enforce Receiver's Bond.

There is some difference of opinion as to the mode of proceeding by which liability on a receiver's bond should be enforced, and the same question has here arisen as was considered in connection with the discussion of the mode of proceeding on injunction bonds.⁷² It has sometimes been considered that the liability of the sureties on a receiver's bond is enforceable only in an independent action at law.⁷³ But upon reason and principle it would appear that the practice in this regard may very well be made to conform with the practice which prevails in regard to the enforcement of injunction bonds. In connection with the treatment of that subject, we learned that formerly the rule in the federal courts was that an injunction bond could be

⁶⁹ *Bosworth v. St. Louis Terminal etc. Assn.* (1899) 174 U. S. 182, 43 L. ed. 941.

⁷⁰ *Farlow v. Kelly* (1881) 131 U. S. 201, Appx., and 26 L. ed. 427.

⁷¹ *Baltimore Building etc. Ass'n v. Alderson* (C. C. A.; 1900) 99 Fed. 489, 39 C. C. A. 609.

⁷² See *ante*, §§ 2420, 2421.

⁷³ *Kirker v. Owings* (C. C. A.; 1899)

39 C. C. A. 132, 98 Fed. 499. It was held to be erroneous for the court of equity appointing a receiver to give judgment against the surety on his bond; but as to the receiver himself it was held that inasmuch as he had had full notice of all the proceedings, and had appeared and controverted his liability, the decree against him on the bond was proper.

enforced only in an independent legal action at law, but this practice has been finally abandoned and the doctrine now is that the court of equity which requires the bond to be given may, in its discretion, assess the damages on the bond, referring the cause to a master for that purpose, if need be; or if the court sees fit, it may remit the party to his action at law on the bond.⁷⁴ The same considerations of convenience, as well perhaps as of strict justice, that make it proper for the court of equity to assess the damages on an injunction bond also require that a receiver's bond should likewise be enforceable in the court of equity and in the same suit in which the bond is given. In accordance with this view it has been held that where a bond is required as a condition of the discharge of a receiver, it is enforceable by the court of equity in the same suit. If a court has inherent power to require and take a bond, it also has as a necessary consequence the power to enforce the bond.⁷⁵

However, in view of the diversity of opinion on the point as to whether the receiver's bond is enforceable in the court of equity and in the proceedings in the same cause in which the bond was given, it is desirable that when an order is entered requiring the giving of a bond by the receiver, a provision should be incorporated expressly reserving to the court in that cause the power to give judgment on the bond against both principal and surety.⁷⁶

⁷⁴ See *ante*, § 2421.

⁷⁵ *Twin City Power Co. v. Barrett v. Mohun* (1896) 164 U. S. 311, 312, 41 (C. C. A.; 1903) 61 C. C. A. 288, 126 L. ed. 447, 448.
Fed. 302.

⁷⁶ See the form of the order in Case

CHAPTER LXVIII.

FORECLOSURE PROCEEDINGS.

General Principles.

- § 2809. Scope of Present Chapter.
- 2810. Object of Foreclosure Proceedings.
- 2811. Nature of Foreclosure Suit.
- 2812. Jurisdiction of Federal Court in Foreclosure Suit.
- 2813. Same—Effect of State Laws.
- 2814. Same—Enforcement of State Remedy in Federal Court.
- 2815. Same—Existence of Cumulative Remedy.
- 2816. Same—Pendency of Suit in State Court.
- 2817. State Laws Determining Rights of Parties.
- 2818. Practice of Federal Courts as Affected by State Laws.
- 2819. Existence of Subject-Matter as Affecting Right to Maintain Bill.
- 2820. Necessity for Foreclosure Proceedings.

Right to Foreclose and Conditions Incident to Same.

- 2821. Restrictions on Right to Foreclose—How Interpreted.
- 2822. Same—Request of Bondholders as Condition Precedent.
- 2823. Same—Restriction Tending to Oust Jurisdiction of Court.
- 2824. Various Conditions Affecting Right to Foreclose.
- 2825. Default as Condition Precedent to Suit.
- 2826. Acceleration of Maturity of Debt.
- 2827. Same—Written Demand for Payment.
- 2828. Trustee's Discretion as to Declaring Debt Due.
- 2829. Construction of Accelerating Clause.
- 2830. Creditor's Election Must Be Prompt.
- 2831. Extension of Time by Indulgence or Agreement.
- 2832. Six Months' Clause—Prematurity of Suit.
- 2833. Who May Complain of Prematurity of Suit.
- 2834. Request in Writing for Institution of Suit.

Proceedings Incident to Foreclosure Suit.

- 2835. When Foreclosure May Be Enjoined.
- 2836. Stay of Suit Pending Action at Law.
- 2837. Scope of Foreclosure Proceedings—Separate Suits.
- 2838. Same—When Independent Suit by First Mortgagee Not Permitted.
- 2839. Same—Different Mortgages Included in One Suit.
- 2840. Contents of Bill to Foreclose.
- 2841. Amount and Identity of Coupons Held by Plaintiff.
- 2842. Insufficient Allegation of Innocent Purchase.

- § 2843. Unnecessary Allegations—Averment of Plaintiff's Election.
- 2844. Same—Allegation Negating Proviso of Mortgage.
- 2845. Same—When Allegation of Demand Unnecessary.

Defenses to Foreclosure Suit.

- 2846. Mortgage as Incident of Secured Debt.
- 2847. Defense of Statute of Limitations.
- 2848. Same—Defense Personal to Debtor.
- 2849. Defense of Laches.
- 2850. Presumption of Payment from Lapse of Time.
- 2851. Defense of Fraud.
- 2852. Defense of Innocent Purchase.
- 2853. Sundry Defenses.

General Principles.

§ 2809. Scope of Present Chapter.

In this and the succeeding chapter it is our purpose to discuss such topics connected with the foreclosure of mortgages as appear to have more particular reference to proceedings in the federal courts and such related matters as may be necessary to make those topics in some degree intelligible and consistent. A detailed treatment of the subject of mortgage foreclosure, in its wider bearings, is not desirable and does not comport with the scope of this work. The foreclosure of mortgages is not inappropriately dealt with, as here, in juxtaposition with the subject of receivers, for the receivership proceeding is very commonly a mere incident of a foreclosure suit.

§ 2810. Object of Foreclosure Proceedings.

Originally the object of the foreclosure suit was to foreclose or cut off the equity of redemption of the mortgagor in the mortgaged premises, and this idea is still in some degree involved in the proceeding. However, under the theory of the mortgage now generally prevailing in this country, the mortgage is considered as a mere equitable lien on the premises for the security of the mortgage debt, and in this view the bill to foreclose is merely a proceeding to enforce the mortgage lien, by a sale of the premises, in order that the creditor may get his money, interest, and the expense incident to the suit. The term "foreclosure," in this connection, has therefore come to be a sort of misnomer, as the object of the suit is to enforce the mortgage lien, and not, as formerly, to foreclose the equity of redemption.¹

¹ See 3 Pom. Eq. Jur. (3d ed.) § 1228.

§ 2811. Nature of Foreclosure Suit.

A foreclosure proceeding has sometimes been considered to be partly in the nature of an action *in rem* and partly in the nature of an action *in personam*, because, as ordinarily prosecuted, the purpose of the proceeding is to procure a seizure and sale of the property and a personal judgment against the debtor for any balance remaining due after the proceeds of the property have been applied to the debt.² However, it cannot be said that a foreclosure suit is a proceeding *in rem*, in a technical sense. Such a suit does not purport to summon or invite, by notice or otherwise, all the world to come in, so far as there are any adverse interests; and of course the adjudication in such a suit does not conclude strangers.³

§ 2812. Jurisdiction of Federal Court in Foreclosure Suit.

If the requisite diversity of citizenship exists,⁴ or other condition is present which brings the case within the statutory jurisdiction of the court,⁵ the federal court will entertain jurisdiction of a suit to foreclose a mortgage to the same extent as it will entertain jurisdiction of any other cause of equitable cognizance. The general jurisdiction of the court of equity to entertain a bill for the foreclosure of mortgages is merely a manifestation of its power to enforce liens of all kinds; and the bill to foreclose a mortgage differs in no material particular from a bill to enforce any other lien.⁶

§ 2813. Same—Effect of State Laws.

The jurisdiction of the federal court of equity to entertain a foreclosure proceeding is not in any degree impaired by the existence of a state statute abolishing the proceeding in equity as the means of foreclosing a mortgage and establishing some other adequate remedy under the state law. The jurisdiction of the federal court rests upon the authority conferred by the statutes of the United States, and it is not subject to limitation or control by state laws.⁷ Hence, the exist-

² *Martin v. Pond* (1887) 30 Fed. 15, (district court has jurisdiction to entertain foreclosure suit against consul ac-
17.

³ *Pardee v. Aldridge* (1903) 189 U. S. 433, 47 L. ed. 886. credited to this country from a foreign government).

⁴ *Connecticut Mut. Life Ins. Co. v. Crawford* (1884) 21 Fed. 281; *Winchell v. Carll* (1885) 24 Fed. 855; *Mangels v. Brewing Co.* (1892) 53 Fed. 513. ⁶ *Gibson, Suits in Chan.* (2d ed.) §§ 1036-1041.

⁵ *Pooley v. Luco* (1896) 76 Fed. 146. ⁷ *Ray v. Tatum* (C. C. A.; 1896) 72 Fed. 112, 18 C. C. A. 464.

ence of the distinct statutory state remedy does not affect the right to foreclose in a federal court of equity.⁸

§ 2814. Same—Enforcement of State Remedy in Federal Court.

A statutory method for the foreclosure of mortgages, recognized by state law, can be pursued in a federal court sitting in the state where the particular statutory method is available and in the state where the property covered by the mortgage is situated. Thus in a state where the mortgagee can bring an action of ejectment at law against the mortgagor after condition broken, such remedy may be resorted to in the federal court of law;⁹ and similarly the method of foreclosure by scire facias is available in the federal court, where such method is recognized by the statutes of the state.¹⁰

§ 2815. Same—Existence of Cumulative Remedy.

It is a general rule that the existence of a cumulative remedy of any kind does not prejudice the right of a mortgagee to resort to a foreclosure in equity.¹¹ Where there are two or more methods of foreclosure available, the mortgagee or trustee may elect to pursue either to the exclusion of the other.¹² A mortgagee may adopt any available remedy secured to him by law or by the contract. Thus he may sue at law on the mortgage debt or may bring ejectment for the land (where the mortgage has vested the legal title in him), or he may enter and take possession, and yet his right to foreclose in equity will not be thereby affected.¹³ That a mortgage or deed of trust contains a power of sale under which the property can be sold without resorting to a judicial proceeding does not prevent the mortgagee, or other interested person, from filing a bill in equity to foreclose, if he so prefers.¹⁴

The fact that a party secured by a mortgage has other security that can be subjected to the mortgage debt, does not stand in the way of foreclosure proceedings. A person who has several securities may

⁸ *Benjamin v. Cavaro* (1875) 2 Woods 168, Fed. Cas. No. 1,300.

⁹ *Whiting v. Wellington* (1882) 10 Fed. 810.

¹⁰ *Black v. Black* (1896) 74 Fed. 978.

¹¹ *Dow v. Memphis etc. R. Co.* (1884) 20 Fed. 280; *Furbish v. Sears* (1865) 20 Fed. Cas. No. 5,160.

¹² *Gordon v. Gilfoil* (1878) 99 U. S. 168, 25 L. ed. 383. See *Morris v. Lindauer* (C. C. A.; 1893) 54 Fed. 23, 4 C. A. 162; *Smith Purifier Co. v. Mc-*

¹³ *Groarty* (1890) 130 U. S. 237, 34 L. ed. 346.

¹⁴ *Morrison v. Buckner* (1843) Fed. Cas. No. 9,844.

¹⁴ *Howell v. Western R. Co.* (1876)

94 U. S. 468, 24 L. ed. 258; *Chicago etc. R. Co. v. Fosdick* (1892) 106 U. S. 47, 27 L. ed. 47; *New York Security etc. Co. v. Lincoln St. R. Co.* (1896) 74 Fed. 67;

Beekman v. Hudson River etc. R. Co. (1888) 35 Fed. 3; *Alexander v. Central R. Co.* (1874) 3 Dill. 497.

resort to either.¹⁵ Similarly, the fact that the trustee in a railroad mortgage has a right, upon default, to take possession and operate the road does not prevent a foreclosure.¹⁶

The pendency of an action at law on a note secured by mortgage is no impediment to the maintenance of a suit to foreclose the mortgage.¹⁷ And the reduction of the note to judgment has no more effect.¹⁸ The pendency of an action of ejectment at the suit of the mortgagor to recover the premises included in the mortgage is no obstacle to a suit to foreclose. The rule is the same whether the instrument shows its character as a mortgage on its face or is in form a straight deed with a parol defeasance.¹⁹

§ 2816. Same—Pendency of Suit in State Court.

The pendency in a state court of a suit brought by the trustee to foreclose a mortgage is no bar to a similar suit brought in a federal court, on the same mortgage, by the bondholder or other beneficiary;²⁰ and the fact that the state court, in the cause there pending, has granted an injunction against the foreclosure is not material on the question of the right of the federal court to entertain the proceeding brought in such court.²¹ The institution of executory proceedings in a court of Louisiana upon a mortgage executed in that state and the granting of an order of seizure and sale in such proceedings do not affect the right of the federal court to entertain a foreclosure suit on the same mortgage.²²

The fact that a debtor makes an assignment for the benefit of creditors and that the state court assumes jurisdiction to carry the assignment into effect under the state law does not defeat the power of the federal court to foreclose a mortgage covering the property conveyed by the assignment. In such case the assignee under the deed of assignment is not in the position of a receiver, and his taking possession does not exclude the federal court from the exercise of juris-

¹⁵ *Muller v. Dows* (1876) 94 U. S. 24 L. ed. 737; *Beekman v. Hudson River etc. R. Co.* (1888) 35 Fed. 10; *Weaver* 444, 24 L. ed. 207.

¹⁶ *Alexander v. Central R. R. of Iowa v. Field* (1883) 16 Fed. 22; *Liggett v. (1874) Fed. Cas. No. 166.*

¹⁷ *Ober v. Gallagher* (1876) 93 U. S. 2 Glenn (C. C. A. 1892) 51 Fed. 381, 2 199, 23 L. ed. 823.

¹⁸ *Connecticut Mut. Life Ins. Co. v. Jones* (1880) 8 Fed. 303. 10 C. C. A. 591; *Marshall v. Otto* (1893) 59 Fed. 249.

¹⁹ *Hughes v. Edwards* (1824) 9 Wheat. 489, 6 L. ed. 142.

²¹ *Woodbury v. Alleghany etc. R. Co.* (1895) 72 Fed. 371, 374.

²⁰ *Stanton v. Embrey* (1876) 93 U. S. 548, 23 L. ed. 983; *Insurance Co. v. Gordon v. Gilfoil* (1878) 99 U. S. 168, 25 L. ed. 383; *Benjamin v. Cavaroc Brune's Assignee* (1877) 96 U. S. 588, (1875) 2 Woods 168.

diction over the same property. The assignee is selected by the debtor, not by the court, and he takes the estate subject to the mortgage lien and subject to the right of the mortgagee to foreclose.²³

§ 2817. State Laws Determining Rights of Parties.

While it is true, as previously stated,²⁴ that the jurisdiction of the federal court to entertain a foreclosure proceeding cannot be impaired or taken away by a state statute, it is nevertheless also true that the rights of the parties under a mortgage are determined, as a rule, not only by the terms of the mortgage itself but also by the law of the state where the mortgaged property is located. It follows that in so far as the state statutes create, establish, or define rights under the mortgage, such laws must be given effect in the federal court.²⁵ For instance, the local statutes of limitations of the several states are given effect in foreclosure suits in the federal courts, as determining the rights of the parties under the mortgage.²⁶

§ 2818. Practice of Federal Courts as Affected by State Laws.

While it is not within the power of a state legislature directly to control or determine the practice of the federal court in the exercise of any of its proper and legitimate powers, it is nevertheless true that the federal courts, in determining their own practice as to the foreclosure of mortgages, will so order proceedings as to secure and perfect rights given by the state statute; and it is the duty of federal courts, in making rules for their own guidance, to adjust their practice to that of the state, so far as may be necessary to secure rights existing under the state law in regard to the foreclosure of mortgages.²⁷ But noncompliance with a local law in regard to the time

²³ Edwards *v.* Hill (C. C. A.; 1894) 50 Fed. 723, 8 C. C. A. 233.

²⁴ See, *ante*, § 2813.

²⁵ Dow *v.* Memphis etc. R. Co. (1884) 20 Fed. 260; Hill *v.* Hite (C. C. A.; 1898) 85 Fed. 268. 20 C. C. A. 549, *affirming* (1897) 79 Fed. 826; American

Loan etc. Co. *v.* Union Depot Co. (1897) 80 Fed. 36; Knickerbocker Trust Co. *v.*

Penacook Mfg. Co. (1900) 100 Fed. 814; Ruggles *v.* Southern Minnesota R. Co.

(1872) Fed. Cas. No. 12,121; Samuel *v.*

Holladay (1869) Fed. Cas. No. 12,288. See Hammock *v.* Loan & Trust Co.

(1881) 105 U. S. 77, 26 L. ed. 1111; American Loan & T. Co. *v.* Union Depot

Co. (1897) 80 Fed. 36, 40.

See also *post*, § 2873.

For a consideration of the effect of a local statute on the venue of a foreclosure suit, see Stevens *v.* Ferry (1891) 48 Fed. 7.

A state law granting a stay in proceedings to foreclose by scire facias under the statute has no application to proceedings to foreclose by action. Woodbury *v.* Allegheny etc. R. Co. (1895) 72 Fed. 371.

²⁶ See *post*, § 2847.

²⁷ Connecticut Mut. L. Ins. Co. *v.* Crawford (1884) 21 Fed. 282; Knickerbocker Trust Co. *v.* Penacook Mfg. Co. (1900) 100 Fed. 814.

See also *post*, § 2873.

of sale is not a ground for avoiding foreclosure proceedings in another suit.²⁸

A provision of a state statute in regard to procedure will not be permitted to dispense with any fundamental principle of federal equity practice. Thus an order of confirmation is indispensable to the validity of a sale made in foreclosure proceedings in a federal court, though the state statute dispenses with the necessity for a confirmation and gives to the officer making the sale full authority to adjudicate the title to the purchaser.²⁹

A rule established by the decisions of the state court on a question of general commercial law affecting the enforcement of a mortgage, which rule is in contravention of the doctrine established in the federal courts, will not be recognized.³⁰

§ 2819. Existence of Subject-Matter as Affecting Right to Maintain Bill.

A bill of foreclosure will not lie where the subject-matter of the mortgage has ceased to exist, and an intangible right, which can be dealt with only in connection with a real and tangible thing, cannot be foreclosed where the thing with which it is inseparably associated cannot be dealt with or affected by the decree of the court. For instance, the good will of a business cannot be foreclosed where the business and everything else with which the good will was associated are either out of existence or dissipated.³¹

§ 2820. Necessity for Foreclosure Proceedings.

Where there are many holders of bonds secured by mortgage, the proper remedy, when a default occurs, is by bill to foreclose. If one holder sues at law and obtains judgment it will profit him little, for he will not be permitted to levy execution and sell any of the mortgaged property to the detriment of others having equal or better rights than himself.³² A mortgagee cannot, upon a judgment recovered for a debt secured by his mortgage, levy the execution upon the mortgaged property.³³

²⁸ Andrews v. National etc. Works *affirmed* on ground of laches (1893) 149 (C. C. A.; 1893) 76 Fed. 166, 36 L.R.A. U. S. 436, 37 L. ed. 799, 13 Sup. Ct. 944, 139, 23 C. C. A. 110 (1897) 77 Fed. 774, 23 C. C. A. 454, 36 L.R.A. 153.

²⁹ Nalle v. Young (1896) 160 U. S. 624, 40 L. ed. 560, 16 Sup. Ct. 420.

³⁰ Swett v. Stark (1887) 31 Fed. 858. ³¹ Metropolitan Nat. Bank v. St. Louis Dispatch Co. (1888) 36 Fed. 722

³² Pennock v. Coe (1859) 23 How. 117, 16 L. ed. 436; Hackettstown Nat.

³³ Bank v. Brewing Co. (C. C. A.; 1896) 74 Fed. 110, 20 C. C. A. 327.

³⁴ Pugh v. Fairmont Min. Co. (1884) 112 U. S. 243, 28 L. ed. 686,



Right to Foreclose and Conditions Incident to Same.

§ 2821. Restrictions on Right to Foreclose—How Interpreted.

The remedy by bill of foreclosure is favored in equity, and provisions in a deed of trust or mortgage restrictive of the right of the creditor or trustee to file such a bill are strictly construed.³⁴ Such restrictions are not to be extended by implication. Thus if there is a condition that the trustee shall only take action upon a request from a majority of the bondholders, and this condition can be construed as referring primarily to his taking of actual possession under the trust deed, or to the making of a sale under the power contained therein, it will not be construed, by implication, as a restriction on the trustee's right to file a bill of foreclosure.³⁵

Morgan's Steamship Co. v. Texas Central R. Co. (1890) 137 U. S. 171, 34 L. ed. 625: The condition was that on default continuing for sixty days in the payment of interest or any part of principal, the principal of the bonds should become immediately due, and that upon request of seventy-five per cent of the holders of bonds, and written notice of the same, the trustee should take possession of the property, and operate it for the benefit of the bondholders, and that upon like request he should proceed to foreclose the mortgage and sell the property to the highest bidder for cash. It was also provided that nothing contained in the instrument should be construed to prevent or interfere with the foreclosure by any court of competent jurisdiction. It was held that the trustee could maintain a bill to foreclose the mortgage upon occurrence of a default, without averring or proving a request of seventy-five per cent of the bondholders, as such request was necessary only in case the trustee wished to proceed to foreclose or take possession *ex mero motu* without the intervention of a court.

§ 2822. Same—Request of Bondholders as Condition Precedent.

However, if a provision requiring the trustee to proceed only upon request of a certain per cent of the bondholders is directed expressly

³⁴ *Land Title etc. Co. v. Asphalt Co.* (1874) 3 Dill. 487; *Credit Co. v. Arkansas Cent. R. Co.* (1882) 15 Fed. 46; *Central Trust Co. v. Texas etc. R. Co.* (1885) 23 Fed. 846; *Farmers' Loan etc. Co. v. Winona etc. R. Co.* (1893) 59 Fed. 957; *Mercantile Trust Co. v. Chicago etc. R. Co.* (1893) 61 Fed. 373; *Toler r. East Tennessee etc. R. Co.* (1894) 67 Fed. 188. Compare *New York Security etc. Co. v. Lincoln etc. R. Co.* (1896) 74 Fed. 67 (1896) 77 Fed. 527.

The course of procedure prescribed in the mortgage as proper to be followed by the trustee in conducting a sale under the power will not be construed as referring to the procedure in a foreclosure suit. *Farmers' Loan etc. Co. v. Green Bay etc. R. Co.* (1881) 6 Fed. 100, 105.

³⁵ *Guaranty Trust etc. Co. v. Green Cove etc. Co.* (1891) 139 U. S. 137, 35 L. ed. 116; *Alexander v. Central R. Co.*

A provision that the trustee may sell after default for six months provided the president of the mortgagor has previously been served with notice of the default does not apply in a suit by the

to the matter of bringing a suit to foreclose, it will be given effect; and a bill brought by the trustee to foreclose must allege that the required number of bondholders have requested him to bring the suit.³⁶

§ 2823. Same—Restriction Tending to Oust Jurisdiction of Court.

The right to foreclose in equity is not taken away by a provision to the effect that neither the whole nor any part of the mortgaged premises shall be sold under proceedings either at law or in equity, the intention being that the mode of sale by the trustee prescribed in the mortgage should be exclusive. Such a clause is void as tending to oust the ordinary jurisdiction of the courts.³⁷

§ 2824. Various Conditions Affecting Right to Foreclose.

The right of foreclosure on account of the insolvency of a debtor corporation is not defeated by the fact that the corporation has the right to make calls on its stockholders, by which proceeding funds could be obtained to pay the indebtedness.³⁸ The same is true of a provision giving a power of sale.³⁹

The right to foreclose a mortgage securing convertible bonds on notes is not affected, or lost, where the holder makes a conditional agreement to convert them into stock but the conversion fails to take place because the condition is not complied with.⁴⁰

§ 2825. Default as Condition Precedent to Suit.

A bill to foreclose a mortgage will lie only where there has been a breach of the condition of the mortgage.⁴¹ If no time for payment is mentioned in the mortgage and the debt is already due and payable, foreclosure may be had forthwith and at any time.⁴² A default in the payment of interest is a default in the payment of the debt, interest when due being treated as principal.⁴³

trustee to foreclose. *Robinson v. Alabama etc. Mig. Co.* (1891) 48 Fed. 12 (1893; C. C. A.) 58 Fed. 690, 6 C. C. A. 79.

³⁹ *Hall v. Sullivan R. Co.* (1857) Fed. Cas. No. 5,948.

⁴⁰ *Pugh v. Fairmont Gold etc. Mining Co.* (1884) 112 U. S. 238, 28 L. ed. 684.

³⁶ *Chicago etc. R. Co. v. Fosdick* (1882) 106 U. S. 47, 77, 27 L. ed. 47, 58.

⁴¹ *Hampton v. Phipps* (1883) 108 U. S. 260, 27 L. ed. 719.

³⁷ *Guaranty Trust etc. Co. v. Green* ⁴² *Wright v. Shumway* (1853) 1 Biss. ⁴³ *Cove etc. R. Co.* (1891) 139 U. S. 137, 23, Fed. Cas. No. 18,093.

³⁸ 25 L. ed. 116, 11 Sup. Ct. 512.

⁴⁴ *Pennsylvania Co. v. Philadelphia etc. R. Co.* (1895) 69 Fed. 482; New

³⁹ *Land Title etc. Co. v. Asphalt Co. etc.* R. Co.; 1903) 127 Fed. 1, 62 C. C. 23.

⁴⁵ *New York Security etc. Trust Co. v. Lincoln etc. R. Co.* (1896) 74 Fed. 67.

§ 2826. Acceleration of Maturity of Debt.

A provision in a mortgage to the effect that the whole debt shall become due, or may be treated as due, upon default in the payment of interest or of a single instalment, will be given effect; and the whole debt may be foreclosed, including future instalments, if the creditor elects to treat the whole as due.⁴⁴ Such a provision is not treated as being a contract for a penalty against which equity will relieve.⁴⁵ But a court of equity will not countenance or give effect to a provision accelerating the maturity of the whole debt upon failure to pay interest or a single instalment where the creditor by trickery or stratagem has brought on the technical condition upon which he exercises the right. His purpose must be open and honest, and advantage cannot be taken of any misleading conduct on his own part.⁴⁶

The right to have the whole debt declared due upon default in the payment of an instalment of the debt or interest, will not be declared to exist on inference only. Such a provision must be express.⁴⁷

A covenant or stipulation that the payee of the notes secured by a mortgage may treat the whole debt as due upon default in the payment of the interest, passes to a purchaser of the notes and mortgage, and the option may be exercised by him to the same extent as by the original payee.⁴⁸

§ 2827. Same—Written Demand for Payment.

In order to make a default effective for the purposes of foreclosure it is not infrequently required that a demand in writing shall be made for the payment of the debt, instalment, or interest, as the case may be.⁴⁹

§ 2828. Trustee's Discretion as to Declaring Debt Due.

A trustee who is clothed with a discretion, under certain contingencies, to declare the whole mortgage debt due, should act upon an honest and disinterested judgment. His discretion in this, as in

⁴⁴ *Noonan v. Braley* (1863) 2 Black 499, 17 L. ed. 278.

In *American Loan etc. Co. v. Union Depot Co.* (1897) 80 Fed. 36, there was a provision in the mortgage that foreclosure could be had upon default in payment of interest and that the whole debt should be considered as mature at the time of the completion of the sale.

⁴⁵ *Ruggles v. Southern etc. R. Co.* (1872) Fed. Cas. No. 12,121.

⁴⁶ *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* (1889) 37 Fed. 289.

⁴⁷ *Grape Creek etc. Co. v. Farmers' Loan etc. Co.* (C. C. A.; 1894) 12 C. C. A. 350, 63 Fed. 895.

⁴⁸ *Swett v. Stark* (1887) 31 Fed. 858.

⁴⁹ As to what constitutes a sufficient demand in writing for the payment of a mortgage debt within the meaning of a particular mortgage, see *Pennsylvania Co. v. Philadelphia etc. R. Co.* (1896) 69 Fed. 482,

other similar matters, is open to judicial correction. Ordinarily his action will be upheld, if actuated by good faith. The circumstance that he may possibly have been somewhat influenced by considerations of personal interest will not thwart the proceeding.⁵⁰

§ 2829. Construction of Accelerating Clause.

A provision that the debt shall become due and payable upon default in the payment of interest will generally be construed merely as giving the creditor the right to elect to treat the principal as then due for the purpose of foreclosure and not as making the principal unconditionally due, upon such default, so as to start the running of the statute of limitations. But if the creditor elects to treat the debt as then due, the statute begins to run from such default and not from the later date of stipulated maturity.⁵¹

§ 2830. Creditor's Election Must Be Prompt.

Where the creditor has an option to declare a debt due upon default in the payment of interest, his right of election should be promptly exercised after the default occurs, though it is not essential that he should act at once.⁵² In the case cited below the mortgage contained a provision declaring that if any instalment of interest should remain unpaid for ten days, it should be optional with the mortgagee to declare the whole sum due. An instalment of interest fell due in December. The notice of the mortgagee's option to declare the whole debt due was not served until in the succeeding February. It was held that this was too late. "The option should have been declared at the expiration of ten days, or within a very short and reasonable time thereafter."⁵³

§ 2831. Extension of Time by Indulgence or Agreement.

Mere indulgence after default or a promise of indulgence without any binding agreement to extend the debt for a definite time does not affect the right to bring foreclosure proceedings.⁵⁴ Nor will an agreement for indulgence for a definite time be given effect, though based on a consideration, where it is voluntarily waived and repudiated by

⁵⁰ *Brown v. South Carolina R. Co.* (1892) 50 Fed. 853. ⁵² *Wheeler etc. Mfg. Co. v. Howard* (1896) 28 Fed. 741.

⁵¹ *Moline Plow Co. v. Webb* (1891) 141 U. S. 616, 35 L. ed. 879, 12 Sup. Ct. 100; *Richardson v. Warner* (1896) 28 Fed. 343. ⁵³ *Wilson v. Winter* (1881) 6 Fed. 16. ⁵⁴ *Haselton v. Florentine Marble Co.* Eq. Prac. Vol. -103.

all the parties to it as soon as it is made. Nor will a secret agreement be given effect against an innocent purchaser of the bonds who was not a party to the agreement.⁵⁵

§ 2832. Six Months' Clause—Prematurity of Suit.

A foreclosure suit is premature if brought within six months after default, where the deed of trust or mortgage only provides for a suit to be brought after that period.⁵⁶ But the fact that by the provisions of the mortgage the trustees are not entitled, of their own volition, to take possession of the mortgaged property until six months subsequent to default, does not deprive the court of equity of the right to entertain a bill to foreclose prior to that time.⁵⁷

Where a mortgage or deed of trust contains the six months' clause, and a default occurs, the subsequent acceptance of the overdue interest by the creditor restores the mortgage debt to its previous status of immaturity, and a suit to foreclose the mortgage cannot then be maintained.⁵⁸ But if the right to maintain a foreclosure suit is based on the non-payment of one or more instalments of interest, the acceptance of such interest by the mortgagee after the institution of the suit does not entitle the defendant to a dismissal, if other instalments of interest have subsequently matured and remain unpaid. The defendant should pay all.⁵⁹

§ 2833. Who May Complain of Prematurity of Suit.

A provision in a mortgage or trust deed to the effect that a suit to foreclose may not be brought until the expiration of six months from the time of default, is exclusively for the benefit of the debtor, and another creditor cannot complain that a suit is brought before the expiration of such period. The objection must come from the debtor.⁶⁰

§ 2834. Request in Writing for Institution of Suit.

A provision in a mortgage to the effect that no suit shall be brought by the bondholders, or trustee, to foreclose the mortgage except after

⁵⁵ Farmers' Loan etc. Co. v. Rockaway etc. R. Co. (1895) 69 Fed. 9.

⁵⁶ American Loan etc. Co. v. Union Depot Co. (1897) 80 Fed. 36.

⁵⁶ Central Trust Co. v. Worcester Cycle Mfg. Co. (C. C. A.; 1899) 35 C. A. 547, 93 Fed. 712.

⁶⁰ Central Trust Co. v. Worcester Cycle Mfg. Co. (1901) 110 Fed. 491 (1899) 35 C. C. A. 547, 93 Fed. 712;

⁵⁷ State Trust Co. v. Kansas City etc. R. Co. (1903) 120 Fed. 398.

⁵⁸ Guaranty Trust etc. Co. v. Green Cove etc. R. Co. (1891) 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. 612.

⁵⁸ Alabama etc. Co. v. Robinson (C. A.; 1893) 56 Fed. 690, 6 C. C. A. 79.

a request in writing for the bringing of such suit made by the majority of the bondholders, must be complied with, and the bill to foreclose should show this fact.⁶¹ But a strict demand in accordance with such a provision is not necessary where the interest of the trustee becomes antagonistic to that of the bondholders and compliance is impossible.⁶²

A clause in a mortgage making it the positive duty of the trustee to institute foreclosure proceedings upon requisition of the holders of one-third of the bonds when default in the payment of interest has continued six months, is not to be construed as an inhibition against his bringing suit upon default in the payment of interest before such six months has expired.⁶³

Proceedings Incident to Foreclosure Suit.

§ 2835. When Foreclosure May Be Enjoined.

An injunction will lie to prevent the foreclosure of an invalid mortgage.⁶⁴ But the party complaining must be in a position to be adversely affected by the foreclosure. Otherwise he has no standing in court.⁶⁵

§ 2836. Stay of Suit Pending Action at Law.

A foreclosure suit may, in the discretion of the court, be stayed, while an action at law is brought by the plaintiff on the mortgage debt, in order that the defendant may have the right to set up by way of recoupment a claim for unliquidated damages not available to him by cross bill.⁶⁶

§ 2837. Scope of Foreclosure Proceedings—Separate Suits.

As a rule, a party cannot maintain different bills to foreclose one mortgage on several pieces of property covered by it. Therefore the bill should apply to the whole and not a part of the mortgaged premises. But if it appears that the mortgagor had no title to part or that a part has been foreclosed under a prior mortgage, this may be omitted from a suit to foreclose as to the remainder.⁶⁷

⁶¹ *Cochran v. Pittsburg etc. R. Co.* (1907) 150 Fed. 682.

⁶⁵ *Baird v. Warwick Mach. Co.* (1889) 40 Fed. 386.

⁶² *Cochran v. Pittsburg etc. R. Co.* (1907) 150 Fed. 682.

⁶⁶ *Nashua Sav. Bank v. Burlington etc. Co.* (1900) 99 Fed. 14.

⁶³ *Mercantile Trust Co. v. Chicago etc. R. Co.* (1893) 61 Fed. 372.

⁶⁷ *Sedam v. Williams* (1845) 4 McLean 51, Fed. Cas. No. 12,609.

⁶⁴ *Carpenter v. Talbot* (1888) 33 Fed. 537.

Separate suits brought by the trustee and by a bondholder, or other beneficiary, under the same mortgage or trust deed, cannot be maintained. The causes must either be consolidated, or the proceedings in one must be stayed and the controversy transferred to the other. The fact that the trustee's suit has taken such a turn as to contemplate a reorganization, instead of a foreclosure sale, does not justify the maintaining of an independent foreclosure suit by a bondholder, the court still having authority to grant such relief as any of the parties may be entitled to.⁶⁸

A creditor secured by a mortgage on a single piece of property, as a general rule, has a right, when default occurs, to have that property sold and to this end he may file a bill to foreclose the mortgage on that property. By participating in proceedings for the consolidation and merger of the mortgagor company with another corporation, the creditor might conceivably estop himself from so proceeding, but the case would have to be clear.^{69a}

§ 2838. Same—When Independent Suit by First Mortgagee Not Permitted.

A court having acquired full jurisdiction over the property and having appointed a receiver under a bill to foreclose a second mortgage, will not grant a petition filed by the first mortgagee to be permitted to bring an independent suit to foreclose the first mortgage. Being a party to the suit of the second mortgagee, the first mortgagee has ample opportunity to assert all his rights in that suit. The circumstance that he wishes to bring in new parties is no reason for allowing the independent suit, where they can be brought in by cross bill.⁶⁹

§ 2839. Same—Different Mortgages Included in One Suit.

A bill in a foreclosure suit is objectionable for multifariousness when it embraces two distinct mortgages made to secure separate loans on two different pieces of property owned by the same person, if it appears that the two pieces of property have been conveyed by the mortgagor to different parties who are in possession at the time the bill is filed and who are made defendants in the suit.⁷⁰

⁶⁸ Stern *v.* Wisconsin Cent. R. Co. ⁶⁹ Mercantile Trust Co. *v.* Atlantic (1890) 1 Fed. 555. ^{69a} etc. R. Co. (1895) 70 Fed. 518.

^{68a} Olyphant *v.* St. Louis etc. Co. ⁷⁰ Eastern Building etc. Ass'n *v.* Den. (1885) 23 Fed. 465; Central Trust Co. ton (C. C. A.; 1895) 13 C. C. A. 44, *v.* Wabash etc. R. Co. (1885) 23 Fed. 65 Fed. 569, 363.

But two mortgages should be foreclosed under one bill where one is executed to cure defects in the other and no inconsistent rights have accrued under them separately.⁷¹ If a renewal mortgage is void by statute, as having been executed on Sunday, the plaintiff may foreclose the original mortgage. But he cannot have such relief upon a bill brought to foreclose the void mortgage.⁷²

§ 2840. Contents of Bill to Foreclose.

The bill to foreclose should, among other things, sufficiently describe the mortgaged premises, and show the terms and conditions of the mortgage and the amount secured by it. It should also state the sum due and unpaid by the mortgagor. The plaintiff's right to maintain the suit should be fully shown by direct averments in conformity with the rules of equity pleading. A bill has been held insufficient where these facts were not directly alleged but were made to appear indirectly and only by reference to a bill filed in another court, a copy of the same being made an exhibit. The nature and extent of the relief asked should be made to appear, it was said, by clear and exact statements in the bill itself, apart from the exhibits.⁷³

The description of mortgaged property in the bill is sufficient if it is as definite as that contained in the mortgage.⁷⁴

§ 2841. Amount and Identity of Coupons Held by Plaintiff.

Holders of unpaid interest coupons, being entitled to file a bill to foreclose, need not in the bill identify themselves as holders of any particular coupons; nor are they even required to state the exact amount of coupons held by them. The general allegation that the plaintiffs hold such coupons is enough. But the total amount of interest coupons in default is properly stated. The proper time for the holders of the various bonds and coupons to produce them and show the extent of their holdings is when the cause has proceeded to judgment and a reference has been ordered for the purpose of ascertaining such details.⁷⁵ The question of the ownership of the bonds need not be determined in the preliminary stages of the foreclosure proceeding. It is only necessary that there should appear to be a default and the amount of the same.⁷⁶

⁷¹ *Robinson v. Piedmont Marble Co.* (1898) 75 Fed. 91.

⁷⁴ *Grand Trunk R. Co. v. Central Vermont R. Co.* (1898) 88 Fed. 622.

⁷² *Hill v. Hite* (C. C. A.; 1898) 85 Fed. 268, 29 C. C. A. 549.

⁷⁵ *Toler v. East Tennessee etc. R. Co.* (1894) 67 Fed. 168, 181.

⁷³ *Mercantile Trust Co. v. Kanawha etc. R. Co.* (1889) 39 Fed. 337.

⁷⁶ *Guaranty Trust etc. Co. v. Green Cove etc. R. Co.* (1891) 139 U. S. 137,

§ 2842. Insufficient Allegation of Innocent Purchase.

An averment in a bill to foreclose to the effect that the bond and coupons are owned by the plaintiffs and that they acquired title from a prior owner by virtue of an assignment for value, does not entitle the plaintiffs to claim as innocent purchasers for value and without notice, there being nothing to show that the assignment took place before the coupons became overdue.⁷⁷

§ 2843. Unnecessary Allegations—Averment of Plaintiff's Election.

By bringing a bill to foreclose the mortgagee exercises an "option" to treat the whole debt as due on default in payment of interest; and it is not necessary for him to allege in his bill that he exercised his option or that he gave notice thereof to the mortgagee.⁷⁸

§ 2844. Same—Allegation Negativating Proviso of Mortgage.

A bill to foreclose for default in the payment of interest need not negative a proviso in the mortgage which takes away the right to foreclose when the failure to pay such interest is due to the fault of another person than the mortgagor. If the fact contemplated in such proviso exists, it is matter to be set up in the answer by way of defense.⁷⁹

§ 2845. Same—When Allegation of Demand Unnecessary.

If the bill in a foreclosure suit alleges the insolvency of the mortgagor and also that it had no funds at the time and place designated for the payment of the debt, a demand for payment at such place need not be alleged. The law does not require the performance of a fruitless act.⁸⁰

*Defenses to Foreclosure Suit.***§ 2846. Mortgage as Incident of Secured Debt.**

A mortgage or deed of trust is merely an incident of the debt secured by it, and any defense that would be good against the action to enforce the debt itself is a good defense to the bill to foreclose.

⁷⁵ 150, 35 L. ed. 116, 121; Central Trust Co. v. California etc. R. Co. (1901) 110 Fed. 70, 76.

⁷⁶ Caesar v. Capell (1897) 83 Fed. 403, 408.

⁷⁷ Quackenbush v. Lane (1877) Fed. Cas. No. 11,491.

⁷⁸ Little Rock Water Works Co. v. Barret (1881) 103 U. S. 516, 26 L. ed. 523.

⁷⁹ Shaw v. Bill (1877) 95 U. S. 10, 24 L. ed. 333.

Similarly no defense is, as a rule, available against the foreclosure of a mortgage given to secure a negotiable instrument which would not be also available against the negotiable instrument secured by the mortgage.⁸¹

§ 2847. Defense of Statute of Limitations.

That a debt is barred by the statute of limitations of the state where the property lies is therefore a good defense to a bill brought to foreclose a mortgage or deed of trust securing such debt.⁸²

§ 2848. Same—Defense Personal to Debtor.

The defense of the statute of limitations is, generally speaking, personal to the debtor.⁸³ Thus a defendant against whom no judgment is sought on the mortgage debt, and who is joined merely for the purpose of discovering whether he has any interest in the mortgaged property, cannot maintain a demurrer based on the ground that the cause of action is barred by the statute. Such defense cannot be interposed by one who neither owes the debt nor is shown to have an actual interest in the property to be foreclosed. But if such a person should answer and assert an interest in the property, he could then show that the cause of action was barred as between the plaintiff and the mortgage debtor.⁸⁴

Ewell v. Daggs (1883) 108 U. S. 143, 27 L. ed. 682: One A. mortgaged a tract of land to B. to secure a promissory note. A. afterwards conveyed the property to G. W. E. B. sued A. on the promissory note and obtained judgment. Later

⁸¹ *Kenicott v. Wayne County* (1873) Fed. Cas. No. 3,537; *Eubanks v. Leveridge* (1877) Fed. Cas. No. 4,544; *Fox v. Blossom* (1879) Fed. Cas. No. 5,008; *Reeves v. Vinacke* (1881) Fed. Cas. No. 11,863; *Sparks v. Pico* (1859) Fed. Cas. No. 13,211.

As to conditions under which a plea of failure of consideration will or will not defeat a mortgage, see *Bush v. Marshall* (1848) 6 How. 284, 12 L. ed. 440; *Orchard v. Hughes* (1864) 1 Wall. 73, 17 L. ed. 560.

⁸² *Moline Plow Co. v. Webb* (1891) 141 U. S. 618, 35 L. ed. 879, 12 Sup. Ct. 100; *Union Bank v. Stafford* (1851) 12 How. 327, 13 L. ed. 1008; *New Orleans*

Canal etc. Co. v. Stafford (1851) 12 How. 343, 13 L. ed. 1015; *Foster v. Jett* (C. C. A.; 1896) 20 C. C. A. 670, 74 Fed. 678; *Brown v. Grove* (C. C. A.; 1897) 25 C. C. A. 644, 80 Fed. 564;

Cleveland Ins. Co. v. Reed (1857) Fed. Cas. No. 2,889; *Daggs v. Ewell* (1879) 84 Fed. 737.

⁸³ *Sanger v. Nightingale* (1887) 122 U. S. 176, 184, 30 L. ed. 1105, 1106, 7 Sup. Ct. 1109; *Allen v. Smith* (1889) 129 U. S. 465, 32 L. ed. 732, 9 Sup. Ct. 338.

⁸⁴ *Blair v. Silver Peak Mines* (1898) 84 Fed. 737.

he filed a bill to foreclose, joining G. W. E. as a defendant. When this suit was brought, the time for the barring of the original debt had passed. This defense was of course not available to A., the mortgagor, because he had been sued on the note within the period of limitation. G. W. E., however, insisted that he was not a party to that action and urged that the debt ought to be considered as being barred so far as he was concerned and as regards the property to which he had acquired title. This was held untenable. Said the court: "The present suit is not to recover the debt, nor is it a suit against Geo. W. Ewell. He is a party defendant, because he has an interest by a subsequent conveyance in the lands sought to be sold under the mortgage. He has an equity of redemption, which entitles him to prevent a foreclosure and sale by payment of the mortgage debt; but the debt he has to pay is not his own."

§ 2849. Defense of Laches.

Laches sufficient in equity to bar the right to relief is a good defense to a suit to foreclose a mortgage.⁸⁵ In determining what delay is sufficient to constitute laches the courts will consider the analogy of the statute of limitations. Laches cannot be imputed where the cause of action is not yet barred by the statute.⁸⁶

§ 2850. Presumption of Payment from Lapse of Time.

After twenty years there is a presumption that the mortgage debt is discharged, and a suit to foreclose the mortgage cannot then be maintained in the absence of proof rebutting this presumption.⁸⁷ The circumstance that the mortgagee has been in possession during this period of twenty years,⁸⁸ or that a suit to foreclose has been brought, or that the mortgagee or his heirs have continuously resided out of the state, is sufficient to prevent such presumption of discharge from arising.⁸⁹

§ 2851. Defense of Fraud.

Fraud or breach of trust in the transaction out of which the debt or mortgage grew is available as a defense to a foreclosure suit,⁹⁰ but evidence of fraud or duress must be clear and convincing in order to

⁸⁵ *Washington v. Opie* (1892) 145 U. S. 214, 36 L. ed. 680, 12 Sup. Ct. 822, reversing *Opie v. Castleman* (1887) 32 Fed. 511; *Gunnison v. Chicago etc. R.* 226, Fed. Cas. No. 7,754; *Kibbe v. Dunn Co.* (1902) 117 Fed. 629.

⁸⁶ *Cross v. Allen* (1891) 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. 67, *affirming* *Allen v. O'Donald* (1886) 28 Fed. 346. ⁸⁷ *Hughes v. Edwards* (1824) 9 Wheat. 489, 6 L. ed. 142; *Wyman v. Russell* (1869) Fed. Cas. No. 18,115.

⁸⁸ *Brobst v. Brock* (1871) 10 Wall. 519, 19 L. ed. 1002.

⁸⁹ *Kibbe v. Thompson* (1873) 5 Biss. (1873) 5 Biss. 233, Fed. Cas. No. 7,753.

⁹⁰ *Weaver v. Field* (1886) 114 U. S. 244, 29 L. ed. 143, 5 Sup. Ct. 844, *affirming* (1883) 16 Fed. 22.

impeach a deed duly signed and acknowledged.⁹¹ In defense of a suit to foreclose a mortgage given by the vendee of a particular piece of land, the vendee may set up a fraud perpetrated upon him in the transaction out of which the mortgage grew, though the fraud pertains more particularly to the sale to him of another lot on which a separate mortgage was given by him.⁹²

An alleged fraud in the sale of land is not a good defense to a foreclosure suit on the mortgage for the purchase money where the vendee, having knowledge of the alleged fraud, fails to attempt to avoid the transaction but on the contrary asserts rights under it.⁹³

§ 2852. Defense of Innocent Purchase.

Though as a general rule the purchaser of securities in the open market is deemed to be a *bona fide* holder, nevertheless when the mortgage or deed of trust has been found to be without consideration, the burden rests on the holder to show that he was an innocent purchaser for value.⁹⁴

§ 2853. Sundry Defenses.

Usury between the original parties to a loan for which a mortgage is given as security is not available as a defense to one who has bought the equity of redemption and against whom foreclosure proceedings are instituted.⁹⁵

Where the debt secured by a mortgage is justly due, it is no defense to the foreclosure suit that the mortgage was animated by hostility or other improper motive.⁹⁶

It is no defense to a foreclosure suit that the trustee has sold the property under the power of sale where it appears that such sale was not valid, for lack of a sufficient memorandum under the statute of frauds.⁹⁷

⁹¹ Northwestern Mut. L. Ins. Co. v. predicated on the right of rescission, Nelson (1881) 103 U. S. 544, 26 L. ed. and hence delay on the part of such 436.

⁹² Hicks v. Jennings (1880) 4 Fed. 855. rescind does not affect the defense. Green v. Turner (C. C. A.; 1898) 86

⁹³ Wright v. Phipps (1898) 90 Fed. 556. Fed. 837, 30 C. C. A. 427. ⁹⁴ McVicar Realty Trust Co. v. Union

A vendee of mortgaged premises who assumes to pay the mortgage debt, may, on being sued by the mortgagee on such assumption of the indebtedness, show that the transaction by which he bought the land and assumed the mortgage was induced by fraud. Such defense is not ⁹⁵ De Wolf v. Johnson (1825) 10 Wheat. 367, 6 L. ed. 343.

⁹⁶ Dickerman v. Northern Trust Co. (1900) 176 U. S. 190, 44 L. ed. 423.

⁹⁷ Cook v. Hilliard (1881) 9 Fed. 4.

Failure to present a note, secured by mortgage, at the bank where it is made payable is no defense to a suit to foreclose the mortgage where the parties to the note expressly waive presentation for payment.⁹⁸

In a suit to foreclose a mortgage on corporate property the answer admitted that the company by its officers executed the mortgage in question to secure the bonds made and delivered by them. It was held that this admission precluded the defense that the officers in question had no authority to execute the mortgage.⁹⁹

⁹⁸ Ray v. Tatum (C. C. A.; 1896) 72 Fed. 112, 18 C. C. A. 464; Tatum v. Ray (1894) 112 U. S. 238, 28 L. ed. (1895) 69 Fed. 682. (Rule applied 684. where it appeared that the debtor had no funds in the bank of payment when the note matured.)

CHAPTER LXIX.

FORECLOSURE PROCEEDINGS (*continued*).

Foreclosure Decree and Proceedings Incident to Sale.

- § 2854. Method of Foreclosure—Strict Foreclosure.
- 2855. Same—Foreclosure Sale.
- 2856. Decree of Sale—Order Nisi.
- 2857. Ascertainment of Indebtedness, Costs, and Expenses.
- 2858. Maturity of Debt as Affecting Decree of Sale.
- 2859. Same—Sale to Satisfy Part of Debt.
- 2860. Practice Where Property Not Divisible.
- 2861. Same—Sale of Railroad Property.
- 2862. Sale Free from Incumbrances.
- 2863. Upset Price.
- 2864. Allowing Trustee to Bid at Foreclosure Sale.
- 2865. Modification of Decree of Sale.
- 2866. Construction of Decree.
- 2867. Confirmation of Sale.
- 2868. Setting Aside for Inadequacy of Price.
- 2869. Ordering Resale.
- 2870. Liability of Master for Unauthorized Sale.
- 2871. Sale in Inverse Order of Alienation.
- 2872. Second Foreclosure Suit.
- 2873. Right of Redemption After Sale Complete.

Application of Proceeds.

- 2874. Distribution of Proceeds as Determined by Terms of Mortgage.
- 2875. Statutory Provisions Governing Distribution of Proceeds.
- 2876. Claims Sharing Equally in Proceeds of Sale.
- 2877. Same—Interest Coupons.
- 2878. Same—Series of Bonds Irregularly Issued.
- 2879. Distribution Subject to Prior Liens and Equities.
- 2880. First Mortgagor's Right of Priority.
- 2881. Purchaser Taking Subject to Existing Liens.
- 2882. When Proceeds Applicable to Part of Debt Not Yet Due.
- 2883. Claims of Subordinate Lienholders.
- 2884. Waiver of Priority by Creditor.
- 2885. Final Residue Payable to Mortgage Debtor.

Deficiency Decree.

- 2886. Power of Court of Equity to Grant Decree for Deficiency.
- 2887. Practice Allowing Deficiency Decree in Federal Courts.
- 2888. Deficiency Decree as Matter of Right.

- § 2889. When Deficiency Recoverable in Separate Legal Action.
- 2890. Who Entitled to Deficiency Decree.
- 2891. Against Whom Deficiency Decree May Be Recovered.
- 2892. Jurisdiction to Enter Personal Deficiency Decree.
- 2893. Jurisdiction as Dependent on Equity of Foreclosure.
- 2894. Maturity of Debt as Affecting Right to Personal Decree.
- 2895. Statute of Limitations.
- 2896. Special Prayer for Deficiency Decree.
- 2897. Interest on Deficiency Decree.

Foreclosure Decree and Proceedings Incident to Sale.

§ 2854. Method of Foreclosure—Strict Foreclosure.

The equity courts of the United States undoubtedly have the power to effect a strict foreclosure in accordance with the practice of the English chancery without any sale of the mortgaged property; and this method of foreclosure may be adopted, under proper conditions, by the federal courts in states where strict foreclosures are allowable under the laws of the state.¹ But where a state statute prohibits resort to the proceeding of strict foreclosure and requires that the remedy shall be by foreclosure sale in all cases, the federal court will not grant a strict foreclosure, as such a state statute confers a right that ought not to be impaired in the federal courts. Where a strict foreclosure is allowed, the proceeding must be in conformity with the usage of the courts of chancery in such cases. One requisite of such a foreclosure is that the amount of the mortgage debt should be ascertained and that the mortgagor should be allowed a specific time within which to pay the debt and redeem from the mortgage before the time is reached when the title of the mortgagee becomes absolute under the decree. This period is dependent on the discretion of the court, but by conventional usage six months is commonly allowed. The period and terms of such redemption are fixed by the primary decree, and the period may be extended from time to time and the conditions changed as the discretion of the chancellor sees fit to order. A decree of strict foreclosure which does not find the amount due and which allows no time for the payment of the debt and the redemption of the property, and which is final and conclusive in the first instance, cannot be sustained in the absence of a special law authorizing it.²

¹ For a statement of the conditions foreclosure is adopted, see 2 Jones under which a strict foreclosure is Mortg. (4th ed.) §§ 1538-1570. proper and permissible in the various ² Clark v. Reyburn (1868) 8 Wall. states, and for a general view of the 318, 322, 19 L. ed. 364. practice in cases where this method of

§ 2855. Same—Foreclosure Sale.

By far the most common method of foreclosure used in the federal courts, as well as in courts of the states, is that which proceeds by a sale of the property.³ This proceeding is in reality rather a substitute for a foreclosure than a foreclosure proceeding in the proper sense. A court of equity has jurisdiction to order a sale independently of statutory provisions, and it can make an order for a sale in a case where a strict foreclosure is specially prayed for, if the court sees fit not to grant the decree of strict foreclosure.⁴

§ 2856. Decree of Sale—Order Nisi.

Where the plaintiff in a foreclosure suit appears to be entitled to a foreclosure, and a sale is ordered for the purpose of carrying the same into effect, the decree will, in the first instance, be drawn so as to allow the debtor or other interested person to come in and pay the amount due, thereby stopping the sale, and either putting the foreclosure proceedings to an end or postponing them. This decree is ordinarily put into the form of an order *nisi*. This order allows a reasonable time for the payment of the indebtedness upon which the right to foreclose is based.⁵ If the right to foreclose is based upon default of the whole debt or the whole can be treated as due, and the order *nisi* is complied with, the whole proceedings are thereby concluded, and the bill will be dismissed; but if the right to foreclose is based upon default in the payment of interest only or of one or more instalments, and the whole debt cannot be treated as due, compliance with the order *nisi* merely entitles the debtor to a suspension of the proceedings until another default occurs.⁶ The decree of sale *nisi* is preliminary in its nature and requires a further order of court to complete it.⁷

§ 2857. Ascertainment of Indebtedness, Costs, and Expenses.

It is not an essential prerequisite to the making of a decree of sale *nisi* that all the costs and expenses incident to the foreclosure be ascer-

³ See, generally, 3 Pom. Eq. Jur. (3d ed.) § 1228; 2 Jones, Mortg. (4th ed.) §§ 1571-1573.

⁴ Sage v. Central R. Co. (1878) 99 U. S. 334, 342, 25 L. ed. 394, 396.

⁵ Toler v. East Tennessee etc. R. Co. (1894) 67 Fed. 188, 181; Merrill v. Dawson (1846) Hempst. 563, Fed. Cas. No. 9,469.

⁶ Farmers' Loan etc. Co. v. Chicago etc. R. Co. (1886) 27 Fed. 146.

⁷ Howell v. Western Railroad Co.

Compare Chicago etc. R. Co. v. Fosdick (1882) 106 U. S. 47, 27 L. ed. 47.

tained, nor that all the disputed claims between the parties or urged by interveners should be precisely adjusted.⁸ All that is necessary is that there should be declared the fact, nature, and extent of the default that justified the filing of the bill and the amount due on account thereof, which is required to be paid in the reasonable limited time.⁹ The ascertainment of the details as to costs and expenses and the determination of the priorities of liens and other conflicting claims may properly be left to be settled by a subsequent decree.¹⁰ Any person entitled to redeem may, at any time before the sale is accomplished, ask the court to determine the exact amount necessary to be paid in order to prevent the sale and redeem the property.¹¹

§ 2858. Maturity of Debt as Affecting Decree of Sale.

In the conduct of foreclosure proceedings and in the ordering of the sale thereunder, it is often necessary to consider whether the whole or only a part of the mortgage debt is due. In the common case the whole debt is either in fact already due, or a provision will be found in the mortgage authorizing the trustee or creditor to treat the whole debt as being due upon default in the payment of any instalment of it or in default in the payment of interest. Where the whole debt is due or can be treated as due, the sale will of course include all of the property covered by the mortgage. It sometimes happens, however, that the mortgage or deed of trust authorizes foreclosure proceedings upon default in the payment of an instalment of the principal or interest, without accelerating the maturity of the whole debt. Where this is the case, a question arises whether the court should order a sale of the whole property covered by the mortgage or a sale of only so much of it as is necessary to satisfy the part of the debt that is already due and unpaid. In this connection it is to be borne in mind that the mortgage is a single indivisible contract, and any foreclosure proceeding based on it will, if pushed to a conclusion, foreclose all the rights covered by the mortgage; and this is true whether the foreclosure is based upon default as to part of the debt, or as to interest alone, or upon default as to the whole of the debt. In every case the single proceeding, when finally concluded and dismissed, will exhaust the mortgage and destroy the possibility of any future action being brought

⁸ *Grape Creek Coal Co. v. Farmers' Loan etc. Co.* (C. C. A.; 1894) 63 Fed. 891, 12 C. C. A. 350. ¹⁰ *First Nat. Bank v. Shedd* (1887) 121 U. S. 74, 30 L. ed. 877, 7 Sup. Ct. 807.

⁹ *Alabama etc. Co. v. Robinson* (C. C. A.; 1896) 72 Fed. 708, 19 C. C. A. 152. ¹¹ *Merrill v. Dawson* (1848) 563, Fed. Cas. No. 9,469.

upon it.¹² But, on the other hand, it is obvious that where only a part of the debt or interest is in default, the decree of the court can be rendered only in respect to the amount actually due and unpaid.¹³ If only the interest or some of the instalments of the principal have matured, it is erroneous for the court to give a decree upon the unmatured portion as if it were due, and the sale must be predicated only on so much as can be decreed to be already due.¹⁴

§ 2859. Same—Sale to Satisfy Part of Debt.

But notwithstanding the considerations stated above, it is often possible for the court so to order the proceedings in the cause as to enable it to give effect to the substantial equities of the respective parties, without doing violence to the rights of either. For instance, if the property can be sold in parcels, or if it is of such nature that part can be easily separated, the sale of only so much will be ordered as is necessary to satisfy the part of the debt or interest already due and unpaid. In such case the court retains jurisdiction over the cause and over the property, and may, from time to time, order the sale of more, as may be necessary to satisfy the several instalments as they mature, or to pay the interest as it falls due.¹⁵ It is well settled that in the exercise of its equitable power to mould its decree of sale to suit the exigencies of each case, the court may order a sale to satisfy such part of the mortgage debt as is actually due, at the same time preserving the lien of the mortgage unimpaired on the property so far as the unmatured portion of the debt is concerned.¹⁶ In such case the cause is retained for further proceedings and directions until the mortgage debt matures.

§ 2860. Practice Where Property Not Divisible.

The procedure indicated above is, however, practicable only in those situations where the mortgaged property can be sold in parcels without detriment to it, and without unnecessary impairment of its value. If the property is not susceptible of being so separated and sold in parcels without injury to the whole, it will be sold as an entirety. In

¹² Howell v. Railroad Co. (1876) 94 U. S. 466, 24 L. ed. 256; Chicago etc. R. Co. (1878) Fed. Cas. No. 14,403. R. Co. v. Fosdick (1882) 106 U. S. 47, 27 L. ed. 47; Grape Creek etc. Co. v. etc. R. Co. (1885) 24 Fed. 407. Farmers' Loan etc. Co. (C. C. A.; 1894) 63 Fed. 895, 12 C. C. A. 350. ¹⁴ Union Trust Co. v. St. Louis etc. R. Co. (1878) 5 Dill. 1, 1⁵ Farmers' Loan etc. Co. v. Oregon 16 Pennsylvania R. Co. v. Allegheny Val. R. Co. (1891) 48 Fed. 139,

such case the lien of the mortgage is entirely exhausted and the whole property is converted into a fund which will be applied to the payment of the part of the debt already due, and any balance will be held by the court as a security for the portion of the debt not yet due; or it may in the discretion of the court be actually applied to the undue debt, just allowance being made in respect to interest not yet due.¹⁷

1. *Black v. Reno* (1894) 59 Fed. 917, 921: In regard to the character of the decree to be entered where the creditor proceeds to foreclose upon default as to the first of a series of notes or upon default as to one instalment of a debt, the court said: "A decree of foreclosure will go for the amount of the debt due, and a sale will be decreed of so much of the mortgaged premises as will be sufficient to satisfy the amount due, and the decree will stand as a security for the remaining instalments as they become due; but, if the property be not susceptible of division into parcels without injury to the whole, it may be sold as an entirety, and any surplus realized beyond a sum requisite to satisfy the debt due will be returned into court, subject to application by the chancellor. In such case, in the conservation of the best interests of all concerned in the fund, the chancellor will at once direct its application to the liquidation of the deferred instalments, with such rebate of interest thereon as may be just and equitable." A reference can, of course, be ordered to ascertain whether the property covered by the mortgage may properly be sold piecemeal or must be sold as a whole.

2. *Howell v. Western R. Co.* (1878) 94 U. S. 463, 24 L. ed. 254: In a suit to foreclose a railroad mortgage given to secure bonds and coupons it appeared that the principal would not mature, and that consequently there could be no default by reason of the nonpayment of the principal, for thirty years; but there had been default as regards the interest coupons, and the mortgage authorized a sale for the nonpayment of these. It was held that the provision authorizing a foreclosure for default in the payment of the coupons was valid; and as there could be but one decree of foreclosure of the same mortgage on the same property the court proceeded in this wise: The amount due on the unpaid coupons was directed to be ascertained and a decree of sale nisi was directed to be entered giving the company a reasonable time to pay the coupons. If they should not be paid within the period so fixed, the court indicated that an absolute order of sale would thereupon be entered. Such sale, it was said, would embrace and foreclose all rights subordinate to (i. e. covered by) the mortgage, and the proceeds would be required to be brought into court. This fund, it was indicated, would represent the security of the mortgage creditors both as to the interest coupons and the unmatured principal; and the court would then be required to provide for the preservation of the security as to the principal as well as to satisfy the unpaid coupons. All holders of junior incumbrances who are made parties to such a suit are foreclosed of the right of redemption, as well as the mortgagor.¹⁸

¹⁷ *Central R. Co. v. Central Trust Co.* justified, see *Shepherd v. Pepper* (1890) 1890) 133 U. S. 83, 33 L. ed. 561. 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct.

As illustrating the conditions under 438.
which a sale, as an entirety, of property covered by different mortgages may be

¹⁸ See *Simmons v. Burlington etc. R. Co.* (1895) 159 U. S. 278, 40 L. ed. 150,

§ 2861. Sale of Railroad Property.

Railroad properties covered by a mortgage are nearly always sold as a whole, it being considered that property of this nature cannot easily or advantageously be severed into parcels and sold at successive intervals. This rule has been followed even in a case where there were three separate first mortgages on three different divisions of the road, each mortgage being also a second mortgage on the other divisions.¹⁹ But a sale of railroad property will not be ordered as an entirety where different branches of the property are subject to different mortgages held by parties with conflicting interests.²⁰

§ 2862. Sale Free from Incumbrances.

In a foreclosure suit brought by a junior incumbrancer, the court may in its discretion sell the property free from all liens, if the first mortgagee is made a party. In such case the lien of the latter is transferred to the proceeds and must be satisfied first.²¹

§ 2863. Upset Price.

In making the order for the sale of mortgaged property an upset price will usually be named. This should be large enough to cover all obligations prior to the mortgage debt, such as costs and allowances made by the court in the foreclosure proceedings, and all receivers' certificates.²² In fixing the upset price, the court can also make allowance for a reasonable profit to be made by the purchaser.²³ Where an upset price is named, and a bid is obtained for the property at that price, or more, the court will usually confirm the sale; but if no upset price has been named, the court has authority to refuse confirmation, if the bid should appear to be insufficient.²⁴

§ 2864. Allowing Trustee to Bid at Foreclosure Sale.

Ordinarily a trustee cannot be permitted to bid at his own sale; but where a trustee was authorized by the terms of the mortgage to

¹⁹ *Low v. Blackford* (C. C. A.; 1898) 87 Fed. 392, 400, 31 C. C. A. 15. suit and "free from claims arising during the receivership and prior thereto,"

²⁰ *Wabaah etc. R. Co. v. Central Trust Co.* (1884) 22 Fed. 188. see *First Nat. Bank v. Ewing* (C. C. A.; 1900) 103 Fed. 168, 43 C. C. A. 150.

²¹ *Hagan v. Walker* (1852) 14 How. 29, 14 L. ed. 312; *Sutherland v. Lake Superior etc. Co.* (1874) Fed. Cas. No. 13,642. ²² *Blair v. St. Louis etc. R. Co.* (1885) 25 Fed. 232.

²³ *Central Trust Co. v. Washington County R. Co.* (1903) 124 Fed. 813, 819. ²⁴ *Central Trust Co. v. Washington County R. Co.* (1908) 124 Fed. 813, 818. Eq. Prac. Vol. —104.

buy the property in at any sale under the mortgage, and to hold the same for the benefit of the bondholders, and where he was also authorized, in the event that he should become a purchaser of the property, to organize a new company, and to transfer the property to such company, it was held to be proper for the court to sanction this authority on the part of the trustee to purchase, or at least to authorize him to bid to the extent of the principal and interest of the bonds represented by him. And provisions in the decree looking to the due carrying out of the further provisions of the trust were also held to be proper.²⁵

§ 2865. Modification of Decree of Sale.

The decree of sale may be amended as regards the details of the sale after the term at which the original decree of sale was entered is past, as by changing the time of publication, mode of sale, and distribution of the proceeds. So, likewise, it can be amended so as to provide that the property shall be sold subject to certain claims for the payment of which it was originally provided that the purchaser should pay money into the court.²⁶

It is within the discretion of the court to allow a postponement of the sale, but such an order will not be made where the party seeking the postponement appears to have been lacking in diligence or fails to show a meritorious ground for such step. An application to postpone has been refused where it was made only two days before the date fixed for the sale and was not accompanied by a tender or offer to pay the amount due.²⁷

§ 2866. Construction of Decree.

In a foreclosure suit where the court has acquired jurisdiction over the property by publication but not over the person of the mortgagee, a decree running to the effect that the plaintiff have and recover of and from the defendant "out of the mortgaged premises" the sum found to be due, will be construed as a decree *in rem* against the property for that amount, *ut res valeat*.²⁸

§ 2867. Confirmation of Sale.

The question of the propriety of confirming a judicial sale may be determined on a motion supported by *ex parte* affidavits, and this

²⁵ *Sage v. Cent. R. R. Co.* (1878) 99 U. S. 334, 25 L. ed. 394. ²⁷ *Duncan v. Atlantic etc. R. Co.* (1880) 88 Fed. 840, 4 Hughes 125.
²⁶ *Turner v. Indianapolis etc. R. Co.* (1878) Fed. Cas. No. 14,289. ²⁸ *Palmer v. McCormick* (1896) 23 Fed. 541.

is the appropriate practice where the situation requires prompt action on the part of the court.²⁹

An objection to the validity of the original decree of sale in a foreclosure suit is not available when the sale comes up for confirmation.³⁰

§ 2868. Setting Aside for Inadequacy of Price.

In order to set aside a sale in foreclosure proceedings on account of the inadequacy of the price, it is not sufficient to show that the property has realized less than its full value. The price must be so inadequate as to show that the sale was not the result of fair dealing and that the purchase was not honestly made.³¹

§ 2869. Ordering Resale.

If the purchaser at a foreclosure sale fails to carry out his contract, the court, having in its previous orders reserved the requisite jurisdiction, may order a resale. Resort to an original bill is not necessary. Such an order may be made on a rule to show cause. An order of resale is proper, for instance, where the purchaser refuses to pay part of the purchase money or any expense for which he is liable.³²

§ 2870. Liability of Master for Unauthorized Sale.

In a mortgage foreclosure proceeding if the master, under the authority of the decree of sale, takes possession of property not embraced in the decree and sells it, he is liable to the owner for such illegal seizure in any proper court.³³

§ 2871. Sale in Inverse Order of Alienation.

Where different portions of the mortgaged property have been sold at different times to different vendees, subsequent to the execution of the mortgage, the property will ordinarily be directed to be sold at the mortgage sale in the inverse order of alienation; and the rule that alienated portions of the mortgaged premises must be sold in the inverse order of their alienation will be enforced as a rule of prop-

²⁹ *Savery v. Sypher* (1868) 6 Wall. 157, 18 L. ed. 822.

³² *Stuart v. Gay* (1888) 127 U. S. 518, 8 Sup. Ct. 1279, 33 L. ed. 191.

³⁰ *Central Trust Co. v. Peoria etc. Co.* (C. C. A.; 1902) 118 Fed. 30, 55 C. A. 52.

³³ *Perry v. Tacoma Mill Co.* (C. C. A.; 1907) 152 Fed. 115, 119, 81 C. C. A., 333,

³¹ *Turner v. Indianapolis etc. R. Co.* (1878) 8 Biss. 380.

erty by a federal court sitting in the jurisdiction where the rule itself is enforced.³⁴

§ 2872. Second Foreclosure Suit.

A second foreclosure bill brought by the same party as the first will be entertained where the first foreclosure appears to have been rendered ineffectual by some defect or mistake in the former proceedings, especially where such error is not chargeable to the plaintiff therein. And the failure of the plaintiff in the original suit to file an amended bill in that suit upon discovering a defect curable by amendment does not prevent him from afterwards maintaining the second foreclosure suit.³⁵

The bill in a second foreclosure suit brought because of the discovery of a defect in the original proceedings should ask that such proceedings be set aside so far as may be necessary to cure the defect and that from such point the original proceedings be carried into effect. Thus, it may be ordered that the sale be set aside and the original order of sale be carried into effect anew, if thereby the defect may be cured.³⁶

§ 2873. Right of Redemption after Sale Complete.

Where the court of equity orders a sale of the mortgaged property, according to its customary practice, in order to realize a fund from which the mortgage debt may be satisfied, the sale is usually made free from the equity of redemption, and a title is finally conferred upon the purchaser which is indefeasible as against the mortgagor.³⁷ There are, however, in some of the states, local statutes securing to the mortgagor a statutory right of redemption within a stated period after the sale. Such a statute creates a right in favor of the mortgagor which must be respected by the federal courts; and in entering a decree for a foreclosure sale, in a state where such a law exists, the federal court will so shape its decree as to preserve the statutory right of redemption, even though, according to the usual practice of the

³⁴ *Orvis v. Powell* (1878) 98 U. S. 176, 25 L. ed. 238.

³⁵ *Johns v. Wilson* (1901) 180 U. S. 440, 45 L. ed. 613, 21 Sup. Ct. 445.

³⁶ *Johns v. Wilson* (1901) 180 U. S. 440, 45 L. ed. 613, 21 Sup. Ct. 445.

³⁷ *Parker v. Dacres* (1889) 130 U. S. 43, 32 L. ed. 848.

A local statute giving a right to 80 Fed. 36.

court, it is proper to have the property sold free from the right of redemption and to enter a final decree barring the right.³⁸ But if an absolute sale is ordered and no provision is made in the decree preserving the statutory right of redemption after the foreclosure sale, such right can nevertheless be exercised within the time limited by the state law.³⁹

An error in entering a decree barring the right of redemption where such right is secured by local statute is not waived by reason of the fact that the party affected by the decree does not pay or tender the sum necessary to redeem and does not appeal until the time fixed by statute for redemption has expired.⁴⁰

Application of Proceeds.

§ 2874. Distribution of Proceeds as Determined by Terms of Mortgage.

In regard to the distribution of the proceeds and surplus resulting from the sale of the mortgaged property in foreclosure proceedings, the first principle to be observed is the order of distribution fixed by the parties to the contract itself. If the mortgage stipulates for a particular mode this predetermines the distribution of the proceeds and fixes the rights of the parties to the mortgage in regard to the same. Thus if the mortgage provides that defaulted interest coupons shall have priority over the principal of the bonds secured by the mortgage, the decree directing the distribution of the surplus should provide that the same shall be first applied to the coupons; and it is erroneous in such case to decree a *pro rata* payment of the coupons and the bonds.⁴¹ But a mere agreement on the part of a company to pay a particular demand out of the proceeds of the first bonds sold does not give that creditor a right to have his claim paid first when the property is foreclosed.⁴²

³⁸ *Brine v. Insurance Co.* (1877) 90 Ins. Co. (1882) 106 U. S. 163, 27 L. ed. U. S. 627, 24 L. ed. 858; *Orvis v. Powell* 129, 1 Sup. Ct. 165. (1878) 98 U. S. 176, 25 L. ed. 238; ⁴¹ *Cutting v. Tavares etc. R. Co.* (C. Swift v. Smith (1880) 102 U. S. 442, 26 L. ed. 193; *Manufacturing Co. v. McCollum* (1884) 24 Fed. 667; *Jackson & Sharp Co. v. Burlington etc. R. Co.* (1887) 29 Fed. 474; *Hards v. Connecticut Mut. L. Ins. Co.* (1878) Fed. Cas. No. 6,055; *Basley v. Flint* (1879) 9 Biss. 204, Fed. Cas. No. 2,168, note.

³⁹ *Burley v. Flint* (1879) Fed. Cas. No. 2,168. ⁴² *Central Trust Co. v. California etc. Co.* (1901) 110 Fed. 70.

⁴⁰ *Mason v. Northwestern Mut. Life*

As to interpretation to be given terms of mortgage in regard to application of proceeds in the particular case, see *McTighe v. Keystone Coal Co.* (C. C. A.; 1900) 99 Fed. 134, 39 C. C. A. 447.

The application of the proceeds may be determined by stipulation of the parties.⁴³

§ 2875. Statutory Provisions Governing Distribution of Proceeds.

The order in which the proceeds of a mortgage foreclosure shall be applied is also subject to such valid statutes as may have been enacted prior to the making of the mortgage.⁴⁴

§ 2876. Claims Sharing Equally in Proceeds of Sale.

In the absence of statute or controlling provision in the mortgage or deed of trust, the rule that equality is equity prevails, and the surplus will be equally distributed upon all of the obligations secured by the mortgage or deed of trust which are actually due and to satisfy which the suit was brought. Thus, if there are several notes given by the same debtor, growing out of the same transaction, and all are due and payable, and secured equally by a mortgage, and there is a judicial foreclosure on all the notes, the proceeds of the sale of the mortgaged property, if not sufficient to pay all the notes, should be credited *pro rata* on the several obligations secured. This rule applies with special force where third persons, such as sureties on some of the notes, are interested in the distribution. The fact that one note matures before the other does not entitle it to preference.⁴⁵

§ 2877. Same—Interest Coupons.

Interest coupons are not entitled to priority in the absence of express provision to that effect, and they will ordinarily be paid *pro rata* with the principal.⁴⁶ The circumstance that coupons held by some creditors have been paid in full gives the holders of other coupons no right to have theirs paid in full to the prejudice of the bonds.⁴⁷

§ 2878. Same—Series of Bonds Irregularly Issued.

If a series of bonds is issued extending to a greater number than is authorized to be issued, all of such bonds must share equally, though

⁴³ Meaning of "gross proceeds," as Moore (C. C. A.; 1898) 85 Fed. 920, 29 used in stipulation concerning the application of the proceeds, see American Surety Co. v. Worcester Cycle Mfg. Co. (1902) 114 Fed. 658.

C. C. A. 636.

⁴⁴ King v. Thompson (C. C. A.; 1901) 110 Fed. 319, 49 C. C. A. 59.

46 Ketchum v. Duncan (1878) 96 U. S. 659, 24 L. ed. 868; Dunham v. Cincinnati etc. R. Co. (1863) 1 Wall. 254, 17 L. ed. 584.

⁴⁵ Burke v. Short (C. C. A.; 1897) 79 Fed. 6, 24 C. C. A. 422; Rogers v. 47 McTighe v. Keystone Coal Co. (C. A.; 1900) 99 Fed. 134, 39 C. C. A. 447. See, however Stevens v. New York

the bonds are serially numbered. All bonds of the series are to be treated as being on the same footing. Those bearing numbers higher than the number where the series should properly have ended are not to be treated as void. The numbering is merely a mechanical device to aid in identifying and registering the bonds.⁴⁸

§ 2879. Distribution Subject to Prior Liens and Equities.

The maxim that equality is equity will not be applied so as to defeat existing legal priorities. Unless in exceptional cases where the assets are of a purely equitable nature, distribution will be made only in conformity with legal liens and priorities.⁴⁹ All liens cleared away by the foreclosure sale attach to the proceeds in the same manner and order, and with the same effect, as they were previously attached to the property itself.⁵⁰ A change in the form of an obligation does not operate to deprive it of a right to preferential payment.⁵¹

A preference attaching to a claim inheres in the claim itself and is not merely a personal right of the holder of the claim. Accordingly, the right of preference passes to an assignee of the claim.⁵²

§ 2880. First Mortgagee's Right of Priority.

If the first mortgagee is made a party to foreclosure proceedings brought by the second mortgagee, and the property is sold for the satisfaction of both mortgages and free from incumbrances, the first mortgage must first be paid in full, then the second mortgage.⁵³ But a prior mortgagee who is not a party to a foreclosure suit brought by a junior mortgagee and whose mortgage still remains an incumbrance on the property in the hands of a purchaser at such foreclosure sale is not entitled to have any part of the proceeds of such sale applied to his

etc. R. Co. (1876) 13 Blatchf. 412, Fed. Cas. No. 13,406.

⁵⁰ *Markey v. Langley* (1876) 92 U. S. 142, 23 L. ed. 701.

⁴⁸ *Stanton v. Alabama etc. R. Co.* (1875) 2 Woods 523, Fed. Cas. No. 13,297.

For a consideration of the subject of the disposition of the proceeds in receivership causes, see *ante*, §§ 2736-2771.

⁴⁹ *Central Trust Co. v. East Tenn. etc. R. Co.* (1895) 69 Fed. 658.

⁵¹ *Appeal of Columbus etc. R. Co.* (C. C. A.; 1901) 109 Fed. 177, 215, 48

The circumstance that different notes secured by the same mortgage represent claims of a different character may justify the giving of preference to some of the notes over the others. *Providence County Sav. Bank v. Frost* (1875) 8

C. C. A. 275.

⁵² *Trust Co. v. Walker* (1883) 107 U. S. 596, 27 L. ed. 490, 2 Sup. Ct. 299; *Columbus etc. R. Co. Appeals* (C. C. A.; 1901) 109 Fed. 197, 48 C. C. A. 275.

⁵³ *Miltenberger v. Logansport etc. R. Co.* (1882) 106 U. S. 286, 27 L. ed. 117.

mortgage. In such case the second mortgagee is entitled to all the proceeds properly applicable to the mortgage indebtedness.⁵⁴

§ 2881. Purchaser Taking Subject to Existing Liens.

In so far as the purchaser at a foreclosure sale takes subject to existing prior liens and incumbrances, he is not entitled to be exonerated from such charges by having any of the purchase price paid by him applied to the extinguishment of such liens. The fact that the existence of the liens may have been unknown does not alter the case. The maxim of *caveat emptor* here applies.⁵⁵

§ 2882. When Proceeds Applicable to Part of Debt Not Yet Due.

Where the mortgaged property is incapable of division without injury and for this reason has to be sold as an entirety, the proceeds may be applied to the payment of the whole debt, that which is not yet due as well as that which is overdue. This stops the interest and extinguishes the entire liability, provided enough is realized from the sale to accomplish this. And such application may be properly made though the mortgage itself authorizes the payment of the overplus to the mortgagor.⁵⁶

§ 2883. Claims of Subordinate Lienholders.

Creditors and incumbrancers having a lien on the premises subordinate to the mortgage in respect to which the sale is made are entitled to share in the proceeds after the prior liens are satisfied. To this end it is not unusual for the court to direct a reference to ascertain the persons who are rightly entitled to share in the fund, in order that a proper distribution of the same may be made;⁵⁷ and any party to the suit having such subordinate lien is entitled to a reference on his own motion. Also, one who has an interest in the property, but who is not an actual party to the suit, may intervene on petition and set up his claim to the proceeds.⁵⁸ By failing to intervene at the proper juncture the rights of a creditor to have his claim allowed out of the fund may be lost.⁵⁹

⁵⁴ Woodworth v. Blair (1884) 112 U. S. 8, 28 L. ed. 615, 5 Sup. Ct. 6.

⁵⁷ 3 Pom. Eq. Jur. (3d ed.) § 1223.

⁵⁸ Jones on Mortg. (4th ed.) 1984.

⁵⁵ Terre Haute etc. R. Co. v. Harrison (C. C. A.; 1898) 96 Fed. 907, 37 C. C. R. Co. (1903) 120 Fed. 398. A. 615.

⁵⁶ Oleott v. Bynum (1879) 17 Wall. 44, 63, 21 L. ed. 570, 575.

⁵⁹ State Trust Co. v. Kansas City etc.

§ 2884. Waiver of Priority by Creditor.

A party entitled to the payment of a particular claim out of a fund resulting from a foreclosure sale loses his right of priority *pro tanto* by consenting to the payment from that fund of other claims not properly chargeable to it.⁶⁰

§ 2885. Final Residue Payable to Mortgage Debtor.

After all the costs and expenses of the foreclosure proceedings have been paid, or provided for, and the mortgage debt satisfied, and after all other legitimate prior charges have been ascertained and paid or secured, any residue remaining in the custody of the court from the proceeds of the sale will be paid to the mortgagor.⁶¹ But a mere holder of a general equity who is not a party to the suit is not entitled to have any part of the proceeds adjudicated to him.⁶²

*Deficiency Decree.***§ 2886. Power of Court of Equity to Grant Decree for Deficiency.**

The practice of rendering a personal decree in a foreclosure suit, against the mortgage debtor, for any balance of the mortgage debt that may remain unsatisfied after the proceeds of the sale have been properly applied thereto is of modern origin. According to the original practice of the English court of chancery, the personal right of action against the debtor for the recovery of the debt was considered entirely distinct from the right to foreclose in equity, or rather the foreclosure proceeding was considered to be merely a cumulative remedy, resort to which did not affect the right to resort to the remedy at law.⁶³ The remedy at law being complete and, so far as it went, adequate, there seemed to be no hardship in the refusal of the equity court to entertain jurisdiction for the purpose of giving a personal deficiency decree enforceable by execution. This notion was especially in harmony with the practice of strict foreclosure, formerly prevalent, by means of which the mortgagor obtained a decree barring the mortgagee's right of redemption, without a sale, thereby securing to himself a complete title to the mortgaged property. With the changes that have in modern times supervened in the equitable conceptions of the respective

⁶⁰ *Central Trust Co. v. Cincinnati etc.* Fed. Cas. No. 6,200; *Omaly v. Swan R. Co.* (1892) 58 Fed. 500. (1824) 3 Mason 474, Fed. Cas. No.

⁶¹ 3 Pom. Eq. Jur. (3d ed.) § 1228. 10,508. Compare *Fairfax v. Hopkins*

⁶² See *Vose v. Bronson* (1867) 6 Wall. (1817) 2 Cranch, C. C. 134, Fed. Cas 452, 18 L. ed. 846. No. 4,614.

⁶³ *Hatch v. White* (1814) 2 Gall. 152,

rights of the parties to the mortgage, and, more particularly, with the extension of the practice of ordering the sale of the mortgaged property to satisfy the mortgage debt, the inconvenience and hardship of remitting the creditor to his separate action at law has become more obvious. If the mortgagor is to be granted the favor of insisting on a sale of the premises—and it is for his benefit exclusively that such sale is made—it is certainly proper that the rule with regard to the right of the creditor to recover the deficiency in the court of equity after the sale is made should be reconsidered. In strict foreclosures, the property itself, on becoming vested in the mortgagee free from the equity of redemption, may well be considered to be a full satisfaction to the defendant. But where the debt is judicially ascertained and the value of the property is lawfully determined by the sale, it seems inequitable to turn the creditor away without a decree for the deficiency. Accordingly in the course of the last century the American courts have gotten away from the earlier rule of English practice. Some of the courts have acted on the principle, very properly applicable here, that having acquired jurisdiction for the purpose of foreclosure and having judicially determined the amount of the deficiency as a natural incident of that proceeding, the court may rightly retain the cause for the purpose of giving a personal decree for the deficiency.⁶⁴ For the most part, however, the change, so far as the state courts are concerned, has been brought about or aided by statutory provisions.

§ 2887. Practice Allowing Deficiency Decree in Federal Courts.

The practice of the supreme court of the United States and of the various federal courts was originally in conformity with the old rule; and, accordingly, the right of the mortgagee to obtain a deficiency decree in foreclosure proceedings was denied in these courts even where the state law provided to the contrary.⁶⁵ By a rule adopted in 1864 the practice on this point in the federal courts was changed, however.⁶⁶

Equity Rule 92: In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the territories having juris-

⁶⁴ *Anderson v. Pilgram* (1888) 30 S. C. 502, 4 L.R.A. 205, *Nolen v. Woods* (1883) 12 Lea 615; *Walters v. Farmers Bank* (1881) 76 Va. 12.

⁶⁵ *Noonan v. Braley* (1862) 2 Black 499, 17 L. ed. 278; *Orchard v. Hughes* (1863) 1 Wall. 73, 17 L. ed. 560.

⁶⁶ A bill to foreclose a vendor's press lien is in substance a bill to foreclose a mortgage, and the equity rule giving the plaintiff the right to a personal decree for the unsatisfied residue is applicable in such a suit. *White v. Ewing* (C. C. A.; 1895) 69 Fed. 451, 16

diction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.⁶⁷

§ 2888. Deficiency Decree as Matter of Right.

Under this rule it has been held that the mortgagee is entitled to a deficiency decree as a matter of right, and not as of mere discretion, such a decree being "a necessary incident of a foreclosure suit in equity."⁶⁸

Northwestern Mut. Life Ins. Co. v. Keith (C. C. A.; 1896) 77 Fed. 374, 23 C. C. A. 196: In reversing a decree of the court below for refusing to grant a decree for a deficiency, the circuit court of appeals of the eighth circuit said: "The only debatable point is whether the word 'may' as used in the rule, is permissive or mandatory. Instances are very common where the word 'may' is used as a synonym for 'shall' or 'must.' The word is usually construed as being mandatory, rather than permissive, when a statute prescribing rules of procedure declares that in a certain event the court 'may' act in a certain way. To warrant a different interpretation in such cases, it should clearly appear from other provisions of the statute that the exercise of the power conferred was intended to be discretionary. We can perceive no good or sufficient reason why the word 'may' as used in rule 92, should be regarded as conferring a discretionary power, to be exercised, or not, at the will of the chancellor. It is a well-known maxim that a court of equity, having acquired jurisdiction of a case, will proceed to administer full and complete relief, and will not compel either party to seek further relief in another forum if it can avoid doing so. When, therefore, in a foreclosure suit the amount of the mortgage debt has been ascertained and adjudicated, and a sale of the mortgaged property has been ordered, made, and confirmed, and the amount realized from such sale is insufficient to pay the mortgage indebtedness, no reason would seem to exist why the chancellor should be vested with the discretion to refuse to render a judgment for the deficiency. Such action on its part is not beneficial to either party, but simply compels the complainant to resort to a court of law for further relief, which might as well be administered in the foreclosure suit."⁶⁹

A clause in a deed of trust, prescribing the terms of sale, which shows an expectation on the part of the creditor that the property will,

C. C. A. 296, modifying (1895) 66 Fed. S. 445, 27 L. ed. 206, 1 Sup. Ct. 335; 2, 13 C. C. A. 276. Shepherd v. Pepper (1890) 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. 438.

⁶⁷ In the District of Columbia the entering of a deficiency decree in mortgage foreclosure is authorized by statute. The statute applies also to proceedings to foreclose a deed of trust in the nature of a mortgage. Dodge v. Freedman's Sav. etc. Co. (1882) 106 U. rule 92 gives the court a discretionary

⁶⁸ Shepherd v. Pepper (1890) 133 U. S. 626, 33 L. ed. 706.

⁶⁹ In Phelps v. Loyhed (1871) 1 Dill. 512, Fed. Cas. No. 11,077, Judge Dillon had expressed the opinion that equity

if sold, bring at least the amount of the debt and expenses does not estop the creditor from recovering a deficiency, where the property is sold according to the terms of the deed and fails to realize enough to pay off the debt.⁷⁰

§ 2880. When Deficiency Recoverable in Separate Legal Action.

Though it thus appears that a plaintiff who seeks a personal decree for a deficiency is entitled to have such a decree in the foreclosure suit, and the court has no discretion to refuse it, it is nevertheless true that if, in any foreclosure proceeding, a deficiency decree is not in fact awarded, the plaintiff, being entitled thereto, may recover the deficiency in an independent action at law. Equity rule 92 confers merely a concurrent jurisdiction on the court of equity as regards the deficiency, and its jurisdiction in this respect is not exclusive. However, in determining the question whether a separate action at law will lie in a federal court to recover a deficiency, some consideration must be given to the law of the state in reference to the recovery of such a deficiency in actions at law; for in federal courts of law the same forms of proceeding are followed and the same rights are generally enforced, as in the state courts. Accordingly where a state statute expressly provides that a separate action at law cannot be maintained to recover a deficiency, such statute will be given effect in the federal court;⁷¹ and in such states, the creditor's exclusive remedy is to obtain his deficiency decree in the foreclosure suit.

§ 2880. Who Entitled to Deficiency Decree.

A deficiency decree will be granted in a foreclosure suit in favor of any party who has a personal right of action on the mortgage debt against the defendant in the proceedings. A junior lienholder may recover a deficiency decree, though the property is wholly consumed in paying off the prior incumbrance.⁷²

§ 2891. Against Whom Deficiency Decree May Be Recovered.

In a foreclosure suit a deficiency decree may be recovered against a grantee of the mortgagor, where such grantee has purchased the

authority, and he accordingly refused to grant a deficiency decree where the plaintiff was guilty of laches though the debt was not actually barred.

⁷¹ *Winters v. Hub Mining Co.* (1883) 57 Fed. 287. ⁷² *Hayden v. Drury* (1880) 3 Fed. 782; *Jarboe v. Temple* (1880) 39 Fed. 306, 29 L. ed. 490, 6 Sup. Ct. 119.

⁷⁰ *Shepherd v. May* (1885) 115 U. S. 210.

property and assumed the mortgage debt, provided he is a party to the foreclosure proceeding.⁷³

A deficiency in a mortgage debt, left unpaid after the foreclosure of a mortgage for the purchase money of land, cannot be recovered from one who, though jointly interested in the purchase of the land, was not a party to the purchase money note which the mortgage was given to secure.⁷⁴

In a suit to foreclose a mortgage against husband and wife, a deficiency decree cannot be given against the wife, she not being personally liable for the mortgage debt.⁷⁵

§ 2892. Jurisdiction to Enter Personal Deficiency Decree.

Before a personal deficiency decree can be entered in a foreclosure suit, the court must have jurisdiction of the person of the mortgage debtor. Jurisdiction over the property, secured by the constructive service of publication, is not enough.⁷⁶ Where a deficiency decree cannot be entered for lack of jurisdiction over the person, the deficiency as ascertained by the court after sale constitutes an indebtedness that may be recovered in an appropriate independent action.⁷⁷

If a personal right of action against one defendant happens to be so associated with a mortgage foreclosure suit against another that it is proper for the court to entertain both causes of action on one suit, the proper decree may be entered on both branches of the case. In other words, a personal judgment may be rendered against a debtor in an action in which a mortgage executed by another person is foreclosed.⁷⁸

§ 2893. Jurisdiction as Dependent on Equity of Foreclosure.

Equity rule 92 does not authorize the rendition of a decree for the debt that is alleged to be secured, where the equity on which a foreclosure is sought wholly fails. The plaintiff is here remitted to his action at law.⁷⁹

The personal decree for a deficiency is dependent on the decree of foreclosure; and upon a reversal of the latter decree, the court may also reverse the personal decree.⁸⁰

⁷³ Hayden v. Drury (1880) 3 Fed. 782, (reversed on other ground (1884) 111 U. S. 223, 28 L. ed. 408); Bisell v. Bugbee (1879) Fed. Cas. No. 1,445.

⁷⁴ Underwood v. Patrick (C. C. A.; 1899) 94 Fed. 468, 36 C. C. A. 330.

⁷⁵ Pawtucket Inst. v. Bowen (1877) 7 Bis. 358, Fed. Cas. No. 10,852.

⁷⁶ *In re Linforth* (1898) 87 Fed. 387.

⁷⁷ *In re Linforth* (1898) 87 Fed. 386.

⁷⁸ Hilton v. Otoe County Nat. Bank (1886) 26 Fed. 202.

⁷⁹ Cumberland etc. Ass'n v. Sparks (1900) 106 Fed. 101.

⁸⁰ Chicago etc. R. Co. v. Fosdick (1882) 106 U. S. 82, 85, 27 L. ed. 64, 65,

§ 2894. Maturity of Debt as Affecting Right to Personal Decree.

A personal decree for the deficiency of the mortgage debt cannot be awarded when the part of the debt constituting the deficiency has not yet matured.⁸¹ In other words, the bill should show that the mortgage debt, as to which the deficiency decree is claimed, is due.⁸² But where the portion of the debt as to which a deficiency decree is desired to be entered has not yet matured, it would, of course, be entirely proper for the court to retain the cause indefinitely for further directions, until all the debt matures. Judgment for the deficiency can then be given at a later stage.

§ 2895. Statute of Limitations.

A deficiency decree will not be entered in a foreclosure proceeding where the secured debt is barred by the statute of limitations. But the defendant, in order to obtain the benefit of such defense, must plead the statute of limitations, and if he does not do so, a decree will be rendered for the deficiency, though the cause of action on the debt is barred.⁸³

§ 2896. Special Prayer for Deficiency Decree.

A personal decree for the deficiency may be awarded, though the bill contains no special prayer for such relief. The relief may be given under the general prayer. But the better practice is to pray specially for a decree for the deficiency.⁸⁴

Inasmuch as a deficiency decree may be given under a prayer for general relief, the court may properly refuse to allow the plaintiff to amend by inserting a special prayer for such relief, such amendment being unnecessary.⁸⁵

§ 2897. Interest on Deficiency Decree.

If the notes secured by a mortgage expressly provide for a particular rate of interest until they are paid, and in a foreclosure suit a

⁸¹ Farmers' Loan etc. Co. v. Grape Loyhed (1871) 1 Dill. 512, Fed. Cas. No. Creek Coal Co. (C. C. A.; 1895) 65 Fed. 11,077.

⁸² 13 C. C. A. 87.

⁸⁴ Seattle etc. R. Co. v. Union Trust

⁸² Ohio Cent. R. Co. v. Central Trust Co. (C. C. A.; 1897) 24 C. C. A. 512, Co. (1890) 133 U. S. 83, 33 L. ed. 561, 79 Fed. 179.

10 Sup. Ct. 235.

⁸⁵ Shepherd v. Pepper (1890) 133 U.

⁸³ Shepherd v. Pepper (1890) 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. 438, S. 651, 33 L. ed. 715, See Phelps v.

decree of sale is entered that does not merge the contract into a personal decree, it is proper to charge interest at the contract rate until the property has been sold and the proceeds applied to the satisfaction of the notes. But after the proceeds have been so applied and a personal decree is entered for the deficiency, this personal decree must thereafterwards bear interest at the rate fixed by law for decrees and judgments.⁸⁸

⁸⁸ Shepherd v. Pepper (1890) 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. 438

APPENDIX.

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

PRELIMINARY REGULATIONS.

1.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3.

Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

Eq. Prac., Vol. III.—106. 1665

4.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties from whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

6.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

PROCESS.

7.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

9.

When any decree or order is for the delivery or possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.¹

10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be

¹ Substantially the same as No. 13, Eng. Ord. in Chan. Aug. 26, 1841.

enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.²

SERVICE OF PROCESS.

11.

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

12.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.³

13.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.⁴

14.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties*

² Adopted from No. 15, Eng. Ord. provision in this rule, compare No. 2, in Chan. Aug. 26, 1841. Eng. Ord. in Chan. April 3, 1828, as

³ With the provision in this rule concerning the memorandum of the date of appearance, compare No. 14, Eng. Ord. Dec. 21, 1833, in Chan. Aug. 26, 1841. With the last

⁴ Based on No. 4, Eng. Ord. in Chan.

quoties, against such defendant, if he shall require it, until due service is made.

15.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

17.

The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurter, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of

attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.⁵

19.

When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the cost of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.⁶

FRAME OF BILLS.

20.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of ___: A. B., of ___, and a citizen of the State of ___, brings this his bill against C. D., of ___, and a citizen of the State of ___, and E. F., of ___, and a citizen of the State of ___. And thereupon your orator complains and says that," etc.

21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or

⁵ This rule was given its present form by an amendment adopted at the October Term, 1878. See 97 U. S. vii.

⁶ See note to preceding rule.

defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they can not be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

23.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

24.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the

instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

26.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.⁷

⁷ Compare No. 12, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

AMENDMENT OF BILLS.**28.**

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.⁸

29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his

⁸ The subject of the amendment of bills 1828, as amended Nov. 23, 1831; but which is treated in this and in the two preceding rules is dealt with in Nos. 13-15, Eng. Ord. in Chan. April 3, from the English orders.

amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

31.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

32.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken

against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.⁹

35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.¹⁰

37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.¹¹

38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed; or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.¹²

ANSWERS.

39.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to

⁹ With the provision as to costs contained in this rule, compare No. 32, Eng. Ord. in Chan. April 30, 1828, as amended Nov. 23, 1831.

¹⁰ Identical with No. 36, Eng. Ord. in Chan. Aug. 26, 1841.

¹¹ Identical with No. 37, Eng. Ord. in Chan. Aug. 26, 1841.

¹² With this rule, compare the similar provisions contained in No. 34, Eng. Ord. in Chan. Aug. 26, 1841, and in No. 35 of the same series.

the character of the parties,¹³ or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a *bona-fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.¹⁴

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered

¹³ By Act of March 3, 1875, ch. 137, templated in the parenthesis contained in sec. 5, all matters affecting the statutory jurisdiction of the court are made available by answer and do not have to be forms with the provisions of No. 16, Eng. specially pleaded in abatement as con- Ord. in Chan. Aug. 26, 1841.

respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.¹⁵

DECEMBER TERM, 1871.

Amendment to Forty-first Equity Rule.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.

42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.¹⁶

43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories here-

¹⁵ Identical with No. 17, Eng. Ord. in Chan. Aug. 26, 1841, ¹⁶ Identical with No. 18, Eng. Ord. in Chan. Aug. 26, 1841,

inafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

- “1. Whether, etc.
- “2. Whether, etc.”¹⁷

44.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.¹⁸

45.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

47.

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

¹⁷ Identical with No. 19, Eng. Ord. in Chan. Aug. 26, 1841. ¹⁸ Identical with No. 38, Eng. Ord. in Chan. Aug. 26, 1841.

48.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

49.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estates, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.¹⁹

50.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.²⁰

51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.²¹

¹⁹ Identical with No. 30, Eng. Ord. in Chan. Aug. 26, 1841.

²¹ Identical with No. 32, Eng. Ord. in Chan. Aug. 26, 1841.

²⁰ Identical with No. 31, Eng. Ord. in Chan. Aug. 26, 1841.

52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.²²

53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.²³

NOMINAL PARTIES TO BILLS.

54.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.²⁴

55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur,

²² Identical with No. 39, Eng. Ord. in Chan. Aug. 26, 1841. ²⁴ Compare No. 29, Eng. Ord. in Chan. Aug. 26, 1841.

²³ Identical with No. 40, Eng. Ord. in Chan. Aug. 26, 1841.

or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

58.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.²⁵

ANSWERS.

59.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or before any notary public.²⁶

AMENDMENT OF ANSWERS.

60.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require the same to be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

61.

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office

²⁵ Substantially the same as No. 49, to be sworn to before a notary public, see Eng. Ord. in Chan. Aug. 26, 1841. 129 U. S. 701.

²⁶ Amended so as to allow the answer

exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.²⁷

62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.²⁸

63.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.²⁹

64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody

²⁷ Compare Nos. 4 and 5, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831. ²⁸ Compare Nos. 5, 12, and 16, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

²⁸ Substantially the same as No. 27, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.²⁰

65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

66.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY—HOW TAKEN.

67.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising

²⁰ Compare No. 8, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.³¹

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and reexamination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of the parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

³¹ The successive amendments to which amendment of October Term, 1891 (144 this rule has been subjected since it was U. S. 689); amendment of May 15, 1893 first promulgated are indicated in the (149 U. S. 793). For the statement of following references: Amendment adopted at December Term 1861 (1 Black 7); 3 Wall. Jr. 187. the substance of the original rule, see

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in Section 885 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

68.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a

commission or by a new deposition taken under the acts of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.

69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable, under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

70.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in

this cause? If yea, set forth the same fully and at large in your answer."³³

CROSS-BILL.

72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.³³

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.³⁴

74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.³⁵

75.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due

³³ Identical with No. 32, Eng. Ord. in Chan. Dec. 21, 1833.

³³ See Nos. 41 and 42, Eng. Ord. in Chan. Aug. 26, 1841.

³⁴ Identical with No. 45, Eng. Ord. in Chan. Aug. 26, 1841.

³⁵ Compare No. 46, Eng. Ord. in Chan. April 8, 1828, as amended Nov. 23, 1831.

notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.³⁶

76.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.³⁷

77.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference, and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.³⁸

³⁶ Compare Nos. 51, 53, and 58, Eng. ³⁸ Compare Nos. 51, 60, 69, and 73, Ord. in Chan. April 3, 1828, as amended Eng. Ord. in Chan. April 3, 1828, as Nov. 23, 1831. amended Nov. 23, 1831.

³⁷ Identical with No. 48, Eng. Ord. in Chan. Aug. 26, 1841.

78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by the order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.²⁹

80.

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.³⁰

81.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order

²⁹ Identical with No. 61, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831. ³⁰ Compare No. 65, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

and in his presence, if either party requires it, in order that the same may be used by the court if necessary.⁴¹

83.

The circuit courts may appoint standing masters in chancery in their respective districts, (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment,) and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.⁴²

EXCEPTIONS TO REPORT OF MASTER.

83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the

⁴¹ Identical with No. 72, Eng. Ord. in ⁴² For original form of this rule see Chan. April 3, 1828, as amended Nov. 23, 1 How. lxxviii. 1831.

cost to be fixed in each case by the court, by a standing rule of the circuit court.

DECREES.

85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.⁴³

86.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz." [Here insert the decree or order.]⁴⁴

GUARDIANS AND PROCHEIN AMIS.

87.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No hearing shall be granted after the term at which the final decree of

⁴³ Substantially the same as No. 45, ⁴⁴ Compare No. 27, Eng. Ord. in Chan. Eng. Ord. in Chan. April 3, 1828, as Dec. 21, 1833. amended Nov. 23, 1831.

the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

89.

The circuit courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

90.

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

91.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

DECEMBER TERM, 1863.

92.

Ordered, That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

OCTOBER TERM, 1878.

INJUNCTIONS.

93.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.⁴⁵

OCTOBER TERM, 1881.

94.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

⁴⁵ See No. 47, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1881.

ORDINANCES OF LORD CHANCELLOR BACON.

1.

No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise.

2.

In case of miscasting (being a matter demonstrative), a decree may be explained and reconciled by an order without a bill of review; not understanding, by miscasting, any pretended misrating or misvaluing, but only error in the auditing or numbering.

3.

No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed—as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone.

4.

But, if any act be decreed to be done which extinguisheth the party's right at the common law, as making of assurance or release, acknowledging satisfaction, canceling of bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court.

5.

No bill of review shall be put in except the party that prefers it enters into recognizance with sureties for satisfying of costs and damages for the delay, if it be found against him.

6.

No decree shall be made upon pretense of equity against the express provision of an act of Parliament. Nevertheless, if the construction of such act of Parliament hath for a time gone away in general opinion and reputation, and after, by a later judgment, hath been controlled, then relief may be given upon matter of equity for cases arising before the said judgment, because the subject was in no default.

7.

Imprisonment for breach of a decree is in nature of an execution, and therefore the custody ought to be strait, and the party not to have any liberty to go abroad but by special license of the lord chancellor; but no close imprisonment is to be but by express order for willful and extraordinary contempts and disobedience as hath been used.

8.

In case of enormous and obstinate disobedience in breach of a decree, an injunction is to be granted *sub pena* of a sum; and upon affidavit or other sufficient proof of persisting in contempts, fines are to be pronounced by the lord chancellor in open court, and the same estreated down into the Hanaper, if cause be, by a special order.

9.

In case of a decree made for the possession of land, a writ of execution goeth forth, and, if that be disobeyed, then process of contempt, according to the course of the court against the person to commission of rebellion, and then a sergeant at arms by special warrant, and, in case the sergeant at arms cannot find him, or be resisted, upon the coming in of the party and his commitment, if he persist in disobedience, an injunction is to be granted for the possession, and, in case that also be disobeyed, then a commission to put him in possession.

10.

Where the party is committed for breach of a decree, he is not to be enlarged until the decree be fully performed in all things which are

to be done presently; but if there be other parts of the decree to be performed at days or times to come, then he may be enlarged by order of court upon recognizance, with sureties, to be put in for the performance *de futuro*; otherwise not.

11.

Where causes come to a hearing in court, no decree bindeth any person who was not served with process *ad audiendum judicium*, according to the course of the court, or did appear *gratis* in person in court.

12.

No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice.

13.

Where causes are dismissed upon full hearing, and the dismission signed by the lord chancellor, such causes shall not be retained again, nor new bill exhibited, except it be upon new matter, like to the case of the bill of review.

14.

In case of other dismissions which are not upon hearing of the cause, if any new bill be brought, the dismission is to be pleaded; and after reference and report of the contents of both suits, and consideration taken of the causes of the former dismission, the court shall rule the retaining or dismissing of the new bill, according to justice and the nature of the case.

15.

All suits grounded upon wills nuncupative, leases parol, or upon long leases that tend to the defeating of the king's tenures, for the establishing of perpetuities, or grounded upon remainders put in to the crown to defeat purchasers, or for brokerage or rewards to make

marriages, or for bargains at play and wagers, or for bargains for offices contrary to the statute of 5 & 6 Edw. VI., or for contracts upon usury or simony, are regularly to be dismissed upon motion if they be the sole effect of the bill, and if there be no special circumstances to move the court to allow them a proceeding, and all suits under the value of ten pounds are regularly to be dismissed.

16.

Dismissions are properly to be prayed and had, either upon hearing or upon plea unto the bill, when the cause comes first into the court; but dismissions are not to be prayed after the parties have been at charges of examination, except it be upon special cause.

17.

If the plaintiff discontinue the prosecution, after all the defendants have answered, above the space of one whole term, the cause is to be dismissed of course, without any motion, but after replication put in no cause is to be dismissed without motion and order of the court.

18.

Double vexation is not to be admitted; but if the party sue for the same cause at common law and in chancery, he is to have a day given to make his election where he will proceed, and, in default of such election, to be dismissed.

19.

Where causes are removed by special certiorari upon a bill containing matter of equity, the plaintiff is, upon receipt of his writ, to put in bond to prove his suggestion within fourteen days after the receipt, which, if he does not prove, then, upon certificate from either of the examiners presented to the lord chancellor, the cause shall be dismissed with costs, and a *procedendo* to be granted.

20.

No injunction of any nature shall be granted, revived, dissolved, or stayed upon any private petition.

21.

No injunction to stay suits at the law shall be granted upon priority of suit only, or upon surmise of the plaintiff's bill only, but upon

matter confessed in the defendant's answer or matter of record, or writing plainly appearing, or when the defendant is in contempt for not answering, or that the debt desired to be stayed appeareth to be old, and hath slept long, or the creditor or the debtor hath been dead some good time before the suit brought.

22.

Where the defendant appears not, but sits an attachment; or where he doth appear, and departs without answer, and is under attachment for not answering; or when he takes oath he cannot answer without sight of evidences in the country; or where, after answer, he sues at common law by attorney, and absents himself beyond sea,—in these cases an injunction is to be granted for the stay of all suits at the common law until the party answer or appear in person in court, and the court give further order; but nevertheless, upon answer put in, if there be no motion made the same term, or the next general seal after the term, to continue the injunction, in regard of the insufficiency of the answer put in, or in regard of the matter confessed in the answer, then the injunction to die and dissolve without any special order.

23.

In the case aforesaid, where an injunction is to be granted for stay of suits at the common law, if the like suit be in the chancery, either by *scire facias* or privilege or English bill, then the suit is to be stayed by order of the court, as it is in other courts by injunction, for that the court cannot enjoin itself.

24.

Where an injunction hath been obtained for stay of suits, and no prosecution is had for the space of three terms, the injunction is to fall of itself, without further motion.

25.

Where a bill comes in after an arrest at the common law for a debt, no injunction shall be granted without bringing the principal money into court, except there appear in the defendant's answer, or by sight of writings, plain matter tending to discharge the debt in equity; but if an injunction be awarded and disobeyed, in that case no money shall be brought in or deposited in regard of the contempt.

26.

Injunctions for possession are not to be granted before a decree, but where the possession hath continuall by the space of three years before the bill exhibited, and upon the same title, and not upon any title by lease, or otherwise determined.

27.

In case where the defendant sits all the process of contempt and cannot be found by the sergeant at arms, or resists the sergeant, or makes rescue, a sequestration shall be granted of the land in question, and, if the defendant render not himself within the year, then an injunction for the possession.

28.

Injunctions against felling of timber, plowing up of ancient pastures, or for the maintaining of inclosures, or the like, shall be granted according to the circumstances of the case; but not in case where the defendant, upon his answer, claimeth an estate of inheritance, except it be where he claimeth the land in trust, or upon some other special ground.

29.

No sequestration shall be granted but of lands, leases, or goods in question, and not of any other lands or goods not contained in the suits.

30.

Where a decree is made for rent to be paid out of land, or a sum of money to be levied out of the profits of land, there a sequestration of the same lands, being in the defendant's hands, may be granted.

31.

Where the decrees of the provincial counsel, or of the court of requests, or the queen's court, are, by continuancy or other means, interrupted, there the court of chancery, upon a bill preferred for corroborations of the same jurisdictions, decrees, and sentences, shall give remedy.

32.

Where any cause comes to a hearing that hath been formerly decreed in any other of the king's courts of justice at Westminster,

such decree shall be first read, and then to proceed to the rest of the evidence on both sides.

33.

Suits after judgment may be admitted according to the ancient custom of the chancery, and the late royal decision of his majesty of record after solemn and great deliberation; but in such suits it is ordered that bond be put in with good sureties to prove the suggestions of the bill.

34.

Decrees upon suits brought after judgment shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party, and rule him to make restitution or perform other acts, according to the equity of the case.

35.

The registers are to be sworn, as hath been lately ordered.

36.

If any order shall be made, and the court not informed of the last material order formerly made, no benefit shall be taken by such order, as granted by abuse and surreptition, and to that end the registers ought duly to mention the former order in the latter.

37.

No order shall be explained upon any private petition, but in court as they are made; and the register is to set down the orders as they were pronounced by the court truly at his peril, without troubling the lord chancellor by any private attending of him to explain his meaning; and if any explanation be desired, it is to be done by public motion, where the other party may be heard.

38.

No draft of any order shall be delivered by the register to either party without keeping a copy by him, to the end that, if the order be not entered, nevertheless the court may be informed what was formerly done, and not put to new trouble and hearing, and to the end, also, that knowledge of orders be not kept back too long from either party, but may presently appear at the office.

39.

Where a cause¹ hath been debated, upon hearing of both parties, and opinion hath been delivered by the court, and, nevertheless, the cause referred to treaty, the registers are not to omit the opinion of the court in drawing of the order of reference, except the court doth specially declare that it be entered without any opinion either way; in which case, nevertheless, the registers are, out of their short note, to draw up some more full remembrance of that that passed in court, to inform the court if the cause come back and cannot be agreed.

40.

The registers, upon sending of their draft unto the counsel of the parties, are not to respect the interlineations or alterations of the said counsel (be the said counsel never so great), further than to put them in remembrance of that which was truly delivered in court, and so to conceive the order upon their oath and duty, without any further respect.

41.

The registers are to be careful in penning and drawing up of decrees, and special matters of difficulty and weight, and therefore, when they present the same to the lord chancellor, they ought to give him understanding which are those decrees of weight, that they may be read and reviewed before his lordship sign them.

42.

The decrees granted at the rolls are to be presented to his lordship, with the orders whereupon they are drawn, within two or three days after every term.

43.

Injunctions for possession, or for stay of suits after verdict, are to be presented to his lordship together with the orders whereupon they go forth, that his lordship may take consideration of the orders before he sign them.

¹ In the text of the Orders the word Chan. 20; it also appears from Tothill, "lease" is inserted instead of "cause" Proceedings of High Court of Chancery as here printed. This typographical error is noted in Beames, Orders in

44.

Where any order upon the special nature of the case shall be made against any of these general rules, there the register shall plainly and expressly set down the particulars, reasons, and grounds moving the court to vary from the general rule.

45.

No reference upon a demurrer or question touching the jurisdiction of the court shall be made to the masters of the chancery, but such demurrers shall be heard and ruled in court, or by the lord chancellor himself.

46.

No order shall be made for the confirming or ratifying of any report without day first given, by the space of a sevennight at the least, to speak to it in court.

47.

No reference shall be made to any masters of the court, or any other commissioners, to hear and determine, where the cause is gone so far as to examination of witnesses, except it be in special cases of parties near in blood, or of extreme poverty, or by consent, and, generally, reference of the state of the cause, except it be by consent of the parties, to be sparingly granted.

48.

No report shall be respected in court which exceedeth the warrant of reference.

49.

The masters of the court are required not to certify the state of any cause as if they would make breviates of the evidence on both sides, which doth little ease the court, but with some opinion, or otherwise in case they think it too doubtful to give opinion, and therefore make such special certificate, the cause is to go on to a judicial hearing without respect had to the same.

50.

Matters of account, unless it be in very weighty causes, are not fit for the court, but to be prepared by reference, with this difference,

nevertheless: that the cause comes first to a hearing, and, upon the entrance into a hearing, they may receive some direction, and be turned over to have the accounts considered, except both parties, before a hearing, do consent to a reference of the examination of the accounts to make it more ready for a hearing.

51.

The like course to be taken for the examination of court rolls, upon customs and copies, which shall not be referred to any one master, but to two masters, at the least.

52.

No reference to be made of the insufficiency of an answer without showing of some particular point of the defect, and not upon surmise of the insufficiency in general.

53.

Where a trust is confessed by the defendant's answer, there needeth no farther hearing of the cause, but a reference presently to be made of the account, and so to go on to a hearing of the accounts.

54.

In all suits where it shall appear, upon the hearing of the cause, that the plaintiff had not *probabilem causam litigandi*, he shall pay unto the defendant his utmost costs, to be assessed by the court.

55.

If any bill, answer, replication, or rejoinder shall be found of an immoderate length, both the party and the counsel under whose hand it passed shall be fined.

56.

If there be contained in any bill, answer, or other pleadings or interrogatory any matter libelous or slanderous against any that is not party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his majesty's courts, such bills, answers, pleadings, or interrogatories shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit for the abuse of the court, and the counselors at law who have set their hands shall likewise receive reproof or punishment, if cause be.

57.

Demurrers and pleas which tend to discharge the suit shall be heard first upon every day of orders, that the subject may know whether he shall need farther attendance or not.

58.

A demurrer is properly upon matter defective contained in the bill itself, and no foreign matter, but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like; and such plea may be put in without oath in case where the matter of the plea appears upon record, but, if it be anything that doth not appear upon record, the plea must be upon oath.

59.

No plea of outlawry shall be allowed without pleading the record *sub pede sigilli*; nor plea of excommunication without the seal of the ordinary.

60.

Where any suit appeareth upon the bill to be of the natures which are regularly to be dismissed, according to the 15th ordinance, such matter is to be set forth by way of demurrer.

61.

Where an answer shall be certified insufficient, the defendant is to pay costs; and if a second answer be returned insufficient in the points before certified insufficient, then double costs; and upon the third, treble costs; and upon the fourth, quadruple costs; and then to be committed also until he hath made a perfect answer, and to be examined upon interrogatories touching the points defective in his answer; but if any answer be certified sufficient, the plaintiff is to pay costs.

62.

No insufficient answer can be taken hold of after replication put in, because it is admitted sufficient by the replication.

63.

An answer to a matter charged, as the defendant's own fact, must be direct, without saying it is to his remembrance, or as he believeth, if it be laid as done within seven years before. If the defendant deny the fact, he must traverse it directly, and not by way of negative pregnant; as, if a fact be laid to be done with diverse circumstances, the defendant may not traverse it literally as it is laid in the bill, but must traverse the point of substance. So, if he be charged with the receipt of £100, he must traverse that he hath not received £100, nor any part thereof, and, if he have received part, he must set forth what part.

64.

If a hearing be prayed upon bill and answer, the answer must be admitted to be true in all points, and a decree ought not to be made but upon hearing the answer read in court.

65.

Where no counsel appears for the defendant at the hearing, and the process appears to have been served, the answer of such defendant is to be read in court.

66.

No new matter is to be contained in any replication, except it be to avoid matter set forth in the defendant's answer.

67.

All copies in chancery shall contain fifteen lines in every sheet thereof, written orderly and unwastefully, unto which shall be subscribed the name of the principal clerk of the office where it is written, or his deputy, for whom he will answer, for which subscription only no fee at all shall be taken.

68.

All commissions for examinations of witnesses shall be *super interr. inclusis* only, and no return of depositions into the court shall be received but such only as shall be either comprised in one roll, subscribed with the name of the commissioners, or else in divers rolls, whereof each one shall be so subscribed.

69.

If both parties join in commissions, and, upon warning given, the defendant bring his commissioners, but produceth no witnesses, nor ministereth interrogatories, but after seek a new commission, the same shall not be granted ; but nevertheless, upon some extraordinary excuse of the defendant's default, he may have liberty granted by special order to examine his witnesses in court upon the former interrogatories, giving the plaintiff, or his attorney, notice that he may examine also if he will.

70.

The defendant is not to be examined upon interrogatories, except it be in very special cases, by express order of the court, to sift out some fraud or practice pregnantly appearing to the court, or otherwise, upon offer of the plaintiff, to be concluded by the answer of the defendant, without any liberty to disprove such answer, or to impeach him after of perjury.

71.

Decrees in other courts may be read upon hearing, without the warrant of any special order, but no depositions taken in any other court are to be read but by special order ; and, regularly, the court granteth no order for reading of deposition, except it be between the same parties, and upon the same title and cause of suit.

72.

No examination is to be had of the credit of any witness but by special order, which is sparingly to be granted.

73.

Witnesses shall not be examined *in perpetuum rei memoriam*, except it be upon the ground of a bill first put in, and answer thereunto made, and the defendant or his attorney made acquainted with the names of the witnesses that the plaintiff would have examined, and so publication to be of such witnesses, with this restraint nevertheless : that no benefit shall be taken of the depositions of such witnesses in case they may be brought *viva voce* upon the trial, but only to be used in case of death before the trial, or age, or impotency, or absence out of the realm at the trial.

74.

No witnesses shall be examined after publication, except it be by consent or by special order *ad informandum conscientiam judicis*, and then to be brought close sealed up to the court, to peruse or publish as the court shall think good.

75.

No affidavit shall be taken or admitted by any master of the chancery tending to the proof or disproof of the title or matter in question, or touching the merits of the cause; neither shall any such matters be colorably inserted in any affidavit for serving of process.

76.

No affidavit shall be taken against affidavit, as far as the masters of the chancery can have knowledge, and, if any such be taken, the latter affidavit shall not be used nor read in court.

77.

In case of contempts granted upon force, or ill words upon serving of process, or upon words of scandal of the court, proved by affidavit, the party is forthwith to stand committed. But for other contempts against the orders or decrees of the court, an attachment goes forth first upon affidavit made, and then the party is to be examined upon interrogatories, and his examination referred. And if, upon his examination, he confess matter of contempt, he is to be committed; if not, the adverse party may examine witnesses to prove the contempt. And therefore, if the contempt appear, the party is to be committed; but, if not, or if the party that pursues the contempt do fail in putting in interrogatories, or other prosecution, or fail in the proof of the contempt, then the party charged with the contempt is to be discharged with good costs.

78.

They that are in contempt, especially so far as proclamation of rebellion, are not to be here, neither in that suit nor any other, except the court of special grace suspend the contempt.

79.

Imprisonment upon contempt for matters passed may be discharged of grace after sufficient punishment, or otherwise dispensed with; but

if the imprisonment be for not performance of any order of the court in force, they ought not to be discharged, except they first obey, but the contempt may be suspended for a time.

80.

Injunctions, sequestrations, dismissions, retainers upon dismissions, or final orders are not to be granted upon petitions.

81.

No former order made in court is to be altered, crossed, or explained upon any petition; but such orders may be stayed upon petition for a small stay, until the matter may be moved in court.

82.

No commission for examination of witnesses shall be discharged, nor no examinations or depositions shall be suppressed upon petition, except it be upon point of course of the court first referred to the clerks, and certificate thereupon.

83.

No demurrer shall be overruled upon petition.

84.

No *scire facias* shall be awarded upon recognizances not enrolled, nor upon recognizances enrolled unless it be upon examination of the record with the writ; nor no recognizance shall be enrolled after the year, except it be upon special order from the lord chancellor.

85.

No writ of *ne exeat regnum*, prohibition, consultation, statute of Northampton, *certiorari* special, or *procedendo* special, or *certiorari* or *procedendo* general, more than one in the same cause; *habeas corpus*, or *corpus cum causa, vi laica removend*,—restitution thereupon, *de coronatore et viridario eligendo* in case of a moving *de homine repleg. assiz.*, or special patent, *inde ballivo amovend*, *certiorari super presentationibus fact, coram commissariis* *seward*, or *ad quod dampnum*, shall pass without warrant under the lord chancellor's hand, and signed by him, save such writs as (of) *ad quod dampnum* as shall be signed by master attorney.

86.

Writs of privilege are to be reduced to a better rule, both for the number of persons that shall be privileged, and for the case of the privilege; and as for the number, it shall be set down by schedule, for the case is to be understood that, besides parties privileged, as attendants upon the court, suitors and witnesses are only to have privilege *cundo, redeundo, et morando*, for their necessary attendance, and not otherwise, and that such writ of privilege dischargeth only an arrest upon the first process; but yet where, at such times of necessary attendance, the party is taken in execution, it is a contempt to the court, and accordingly to be punished.

87.

No *supplicavit* for the good behavior shall be granted but upon articles grounded upon the oath of two, at the least, or certificate of any one justice of assize, or two justices of the peace, with affidavit that it is their hands, or by order of the star chamber or chancery or other of the king's courts.

88.

No recognizance of the good behavior and the peace taken in the country, and certified into the petty bag, shall be filed in the year, without warrant from the lord chancellor.

89.

Writs of *ne exeat regnum* are properly to be granted, according to the suggestion of the writ, in respect of attempts prejudicial to the king and state, in which case the lord chancellor will grant them, upon prayer of any of the principal secretaries, without cause showing, or upon such information as his lordship shall think of weight; but otherwise, also, they may be granted, according to the practice of long time used, in case of interlopers in trade, great bankrupts, in whose estate many subjects are interested, or other cases that concern multitudes of the king's subjects, also in case of duels and divers others.

90.

All writs, certificates, and whatsoever other process *ret. coram rege in Canc.* shall be brought into the chapel of the rolls within convenient time after the return thereof, and shall be there filed, upon their proper files and bundles, as they ought to be, except the deposit-

tions of witnesses, which may remain with any of the six clerks by the space of one year next after the cause shall be determined by decree, or otherwise be dismissed.

91.

'All injunctions shall be enrolled, or the transcript filed, to the end that, if occasion be, the court may take order to award writs of *scire facias* thereupon, as in ancient time hath been used.

92.

All days given by the court to sheriffs to return their writs, or bring their prisoners upon writs of privilege, or otherwise, between party and party, shall be filed either in the register's office or in the petty bag, respectively; and all recognizances taken to the king's use, or unto the court, shall be duly enrolled in convenient time with the clerks of the enrollment, and calendars made of them, and the calendars every Michaelmas term to be presented to the lord chancellor.

93.

In case of suits upon the commissions for charitable uses, to avoid charge, there shall need no bill, but only exceptions to the decree and answer forthwith to be made thereunto; and thereupon, and upon sight of the inquisition, and the decree brought unto the lord chancellor by the clerk of the petty bag, his lordship, upon perusal thereof, will give order under his hand for an absolute decree to be drawn up.

94.

Upon suit for the commission of sewers, the names of those that are desired to be commissioners are to be preferred to the lord chancellor in writing; then his lordship will send the names of some privy counselor, lieutenant of the shire, justices of assize, being resident in the parts for which the commission is prayed, to consider of them, that they be not put in for private respects, and, upon the return of such opinion, his lordship will farther order for the commission to pass.

95.

No new commission of sewers shall be granted while the first is in force, except it be upon discovery of abuse or fault in the first commissioners, or otherwise upon some great and weighty ground.

96.

No petition of bankrupts shall be granted but upon petition first exhibited to the lord chancellor, together with names presented, of which his lordship will take consideration, and always single some learned in the law with the rest, yet so as care be taken that the same parties be not too often used in commissions; and likewise care is to be taken that bond with good surety be entered into, in two hundred pounds at least, to prove him a bankrupt.

97.

No commission of delegates in any case of weight shall be awarded but upon petition preferred to the lord chancellor, who will name the commissioners himself, to the end that they may be persons of convenient quality, having regard to the weight of the cause, and the dignity of the court from whom the appeal is.

98.

Any man shall be admitted to defend *in forma pauperis* upon oath; but for plaintiffs, they are ordinarily to be referred to the court of requests, or to the provincial counsels, if the case arise in the jurisdictions, or to some gentlemen in the country, except it be in some special cases of commiseration or potency of the adverse party.

99.

Licenses to collect for losses by fire or water are not to be granted but upon good certificate, and not for decays of suretyship, or debt, or any other casualties whatsoever; and they are rarely to be renewed; and they are to be directed unto the county where the loss did arise, if it were by fire, and the counties that abut upon it, as the case shall require, and, if it were by sea, then unto the county where the port is from whence the ship went, and to some counties adjoining.

100.

No exemplification shall be made of letters patent (*inter alia*) with omission of the general words; nor of records made void or canceled; nor of the decrees of this court not enrolled; nor of depositions by parcel; nor of depositions in court, to which the hand of the examiner is not subscribed; nor of records of the court, not being enrolled or filed; nor of records of any other courts, before the same be duly certified to this court, and orderly filed here; nor of any

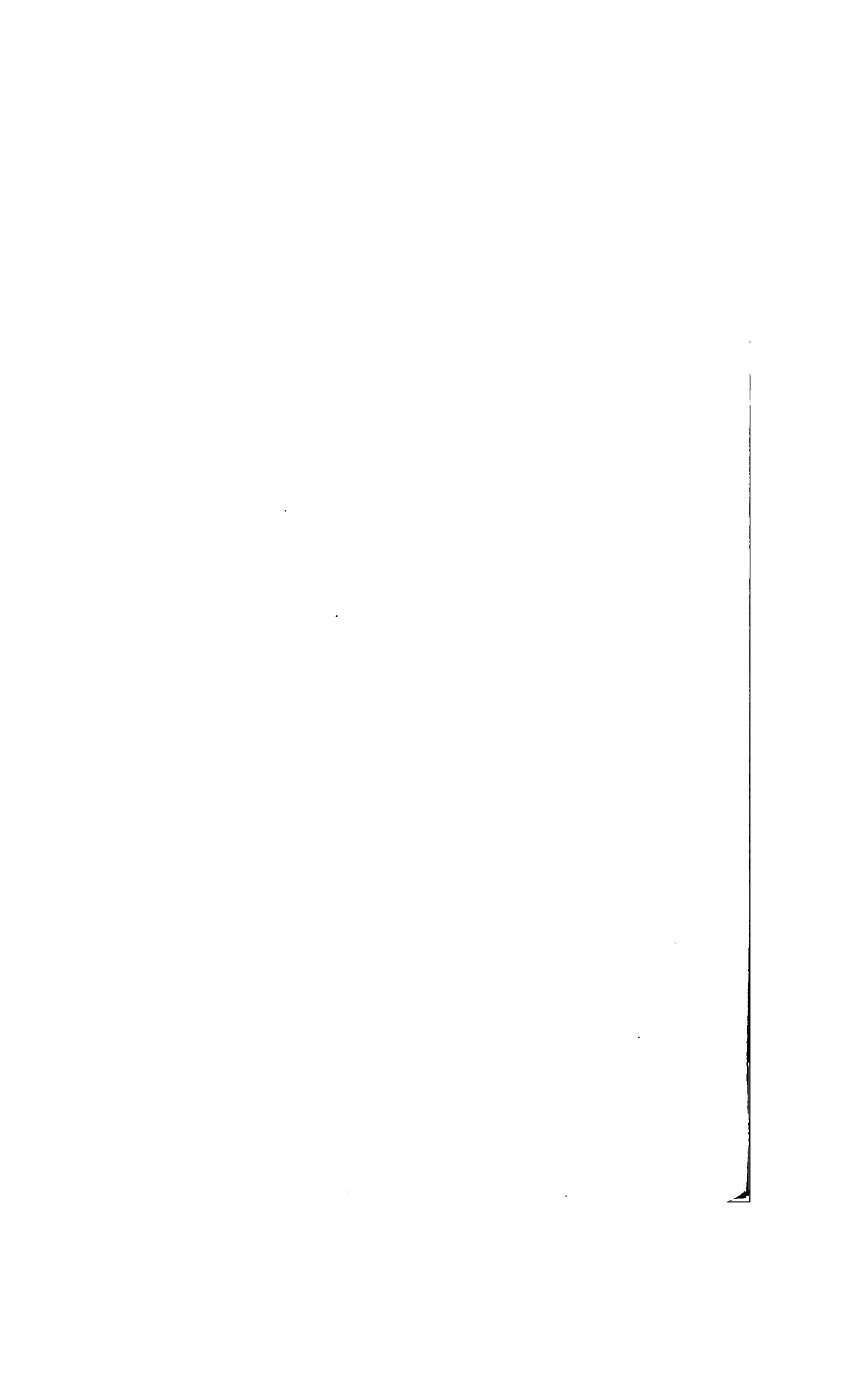
records upon the sight and examination of any copy in paper but upon sight and examination of the original.

101.

And, because time and experience may discover some of these rules to be inconvenient, and some other to be fit to be added, therefore his lordship intendeth, in any such case, from time to time to publish any such revocations or additions.

The foregoing ordinances are taken from Beames, Orders in Chancery, 1-46, and are here reprinted from Fletcher's Equity Pleading and Practice, pp. 1045-1061. The ordinances as set forth in other works differ slightly in phraseology.

Eq. Prac. Vol. III.—108.



ENGLISH ORDERS IN CHANCERY.

ORDERS OF APRIL 3, 1828, AS AMENDED NOVEMBER 23, 1831.¹

1.

That every plaintiff, as well in a country cause as in a town cause, shall be at liberty, without affidavit, to obtain an order for a subpoena returnable immediately; but such subpoena in a country cause is to be without prejudice to the defendant's right to eight days' time to enter his appearance after he has been served with the subpoena.

2.

That a writ of subpoena to appear, or to appear and answer, shall be sued out for each defendant, except in the case of husband and wife defendants; and that the costs of all such writs shall be costs in the cause.

3.

That a defendant in a country cause shall no longer be permitted to crave the common *dedimus*; but shall either put in his answer within eight days after his appearance, or shall obtain the usual orders for time.

4.

That in all cases, whether the defendant's answer be filed in term time or in vacation, the plaintiff shall be allowed two months to deliver exceptions to such answer; but if the exceptions be not delivered within the two months, the answer shall thenceforth be deemed sufficient, and the plaintiff shall have no order to deliver exceptions *nunc pro tunc*.

5.

That when exceptions taken to an answer for insufficiency are not submitted to, the plaintiff may, at the expiration of eight days after the exceptions are delivered, but not before, unless in injunction

¹ See 2 Smith Ch. Pr. (2d ed.) 443-462; 2 Bates Fed. Eq. Proc. 1129-1147.

causes, refer such answer for insufficiency; and if he do not refer the same within the next six days, he shall be considered as having abandoned the exceptions; in which latter case such answer shall thenceforth be deemed sufficient.

6.

That if the plaintiff do not, within three weeks after a defendant's second or third answer is filed, refer the same for insufficiency on the old exceptions, such answer shall thenceforth be deemed sufficient.

7.

That if the plaintiff do refer a defendant's second or third answer for insufficiency on the old exceptions, then the particular exception or exceptions to which he requires a further answer shall be stated in the order.

8.

That if upon a reference of exceptions, the master shall find the answer insufficient, he shall fix the time to be allowed for putting in a further answer, and shall specify the same in his report, from the date whereof such time shall run, and it shall not be necessary for the plaintiff to serve a subpoena for the defendant to make a better answer: And any defendant who shall not put in a further answer within the time so allowed, shall be in contempt, and be dealt with accordingly.

9.

That if upon a reference of exceptions the answer be certified sufficient, it shall be deemed to be so from the date of the master's report; and if the defendant submit to answer without a report from the master, the answer shall be deemed insufficient from the date of the submission.

10.

That upon a third answer being reported insufficient, the defendant shall be examined upon interrogatories to the points reported insufficient, and shall stand committed until such defendant shall have perfectly answered such interrogatories; and shall pay, in addition to the four pounds costs heretofore paid, such further costs as the court shall think fit to award.

11.

That no order shall be made for referring any pleading or other matter depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent, nor unless such order be obtained within six days after the delivery of such exceptions.

12.

That when any order is made for referring an answer for insufficiency, or for referring an answer or other pleading or matter depending before the court for scandal or impertinence, the order shall be considered as abandoned, unless the party obtaining the order shall procure the master's report within a fortnight from the date of such order, or unless the master shall within the fortnight certify that a further time, to be stated in his certificate, is necessary, in order to enable him to make a satisfactory report; in which case the order shall be considered as abandoned if the report be not obtained within the further time so stated; and where such order relates to alleged insufficiency in an answer, such answer shall be deemed sufficient from the time when the order is to be considered as abandoned.

13.

That after an answer has been filed, the plaintiff shall be at liberty, before filing a replication, to obtain upon motion or petition without notice, one order for leave to amend the bill; but no further leave to amend shall be granted after an answer, and before replication, unless the court shall be satisfied by affidavit that the draft of the intended amendments has been settled, approved, and signed by counsel, and that such amendments are not intended to be made for the purpose of delay or vexation, but because the same are considered to be material to the case of the plaintiff; such affidavit to be made by the plaintiff, or one of the plaintiffs, where there is more than one, and his, her, or their solicitor, or by such solicitor alone, in case the plaintiff or plaintiffs, from being abroad or otherwise, shall be unable to join therein; but no order to amend shall be made after answer and before replication, either without notice or upon affidavit in manner hereinbefore mentioned, unless such order be obtained within six weeks after the answer, if there be only one defendant, or after the last of the answers if there be two or more defendants, is to be deemed sufficient. But this order shall not extend to amendments which are made only for

the purpose of rectifying some clerical error, or error in names, dates, or sums; in which cases the order to amend may be obtained upon motion or petition, without notice.

14.

That every order for leave to amend the bill shall contain an undertaking by the plaintiff to amend the bill within three weeks from the date of the order; and in default thereof such order shall become void, and the cause shall, as far as relates to any motion to dismiss the bill for want of prosecution, stand in the same situation as if such order had not been made.

15.

That after a replication has been filed the plaintiff shall not be permitted to withdraw it and to amend the bill without a special order of the court for that purpose, made upon a motion, of which notice has been given; the court being satisfied by affidavit that the matter of the proposed amendment is material and could not, with reasonable diligence, have been sooner introduced into the bill.

16.

That where the answer of a defendant is to be deemed sufficient, whether it be in term time or in vacation, if the plaintiff or plaintiffs shall not proceed in the cause, the defendant shall be at liberty, after the expiration of two months, to move, upon notice, that the bill be dismissed with costs, for want of prosecution; and the bill shall accordingly be dismissed with costs, unless the plaintiff or plaintiffs shall appear upon such motion, and give an undertaking to file a replication, and serve a subpoena to rejoin; and in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission, within three weeks from the date of such undertaking; or unless the plaintiff or plaintiffs, without filing a replication, shall appear upon such motion, and give an undertaking to hear the cause as against the defendant making the motion, upon bill and answer; or unless it shall appear that the plaintiff or plaintiffs is or are unable to proceed in the cause, by reason of any other defendant or defendants not having sufficiently answered the bill, and that due diligence has been used to obtain a sufficient answer or answers from such other defendant or defendants; in which case the court shall allow to the plaintiff or plaintiffs such further time for proceeding in the cause as shall appear to the court to be reasonable. And in case

the plaintiff or plaintiffs do appear upon the motion to dismiss, and give the undertaking to file a replication, and take the other proceedings consequent thereon, hereinbefore required, then all the rules and regulations, with respect to the commission and the return thereof, and the setting down the cause for hearing, and the rights of the defendant with respect to the commission, in case of any default on the part of the plaintiff, which are particularly expressed in the next order, shall apply to all cases under this order.

17.

That where the plaintiff files a replication, without having been served with a notice of motion to dismiss the bill for want of prosecution, he shall serve the subpoena to rejoin; and in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission, within three weeks from the filing of the replication, and such commission shall, at the latest, be returnable on the first return of the second term then next following; and the plaintiff shall give his rules to produce witnesses, and pass publication at the latest in the same term, and shall set down his cause for hearing, and duly serve the subpoena to hear judgment returnable in the succeeding term; and if the plaintiff shall make default herein, then upon application by the defendant, upon notice of motion, the plaintiff's bill shall stand dismissed out of court with costs, unless the court shall make special order to the contrary. And in case the plaintiff serves a subpoena to rejoin, within three weeks after filing the replication, but does not obtain and serve an order for a commission to examine witnesses within that time, then the defendant shall be at liberty, without notice, to obtain an order for a commission to examine witnesses, returnable at the like period as the plaintiff is entitled to, pursuant to this order, and shall have the carriage of such commission. And if the plaintiff obtains an order for, and sues out a commission, and neglects to execute and return the same, at or within the time stated in this order, the defendant shall be entitled to an order as before stated, for a commission returnable on the last return of the term following that which is allowed to the plaintiff by this order, for the return of his commission. And when any commission issues pursuant to this order, or the last foregoing order, the parties shall have liberty to execute the same in term time, and publication shall stand enlarged until the commission shall be returnable; and the plaintiff shall be at liberty to set down the cause, in the meantime, without the necessity of inserting such directions in the order for the commission.

18.

That publication shall not be enlarged except upon special application to the court, made upon notice supported by affidavit, and at the cost of the party applying, unless otherwise ordered by the court.

19.

That the time which occurs between the last seal after Trinity term, and the first seal before Michaelmas term, and between the last seal after Michaelmas term, and the first seal before Hilary term, shall not be reckoned in the computation of time which is allowed to a party for amending any bill, for filing, delivering, or referring exceptions to any answer, or for obtaining a master's report, upon any exceptions.

20.

That service on the clerk in court, of any subpoena to rejoin, or to answer an amended bill, or to hear judgment, shall be deemed good service.

21.

That the order *nisi* for confirming a report may be obtained upon petition as well as by motion, and that service thereof upon the clerk in court of any party shall be deemed good service upon such party.

22.

That every notice of motion, and every petition, notice of which is necessary, shall be served at least two clear days before the hearing of such motion or petition.

23.

That the order *nisi* for dissolving the common injunction may be obtained upon petition as well as by motion, and that every such order be served two clear days at least before the day upon which cause is to be shown against dissolving the injunction.

24.

That when a defendant, in contempt for want of answer, obtains, upon filing his answer, the common order to be discharged as to his contempt, on payment or tender of the costs thereof, or the plaintiff accepts the costs without order, he shall not by such acceptance be

compelled, in the event of the answer being insufficient, to recommence the process of contempt against the defendant, but shall be at liberty to take up the process at the point to which he had before proceeded.

25.

That no witness to be examined before either of the examiners for any party in a cause be in future produced at the seat of the clerk in court for the opposite party; but that a notice in writing containing the name and description of the witness be served there as heretofore.

26.

That the examiner who shall take the examination in chief of any witness shall be at liberty to take his cross-examination also.

27.

That where the same solicitor is employed for two or more defendants, and separate answers shall have been filed, or other proceedings had, by or for two or more defendants separately, the master shall consider, in the taxation of such solicitor's bill of costs, either between party and party, or between solicitor and client, whether such separate answers or other proceedings were necessary or proper; and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

28.

That where a plaintiff obtains a decree with costs, there the costs occasioned to the plaintiff by the insufficiency of the answer of any defendant shall be deemed to be part of the plaintiff's costs in the cause, such sum or sums being deducted therefrom as were paid by the defendant, according to the course of the court, upon the exceptions to the said answer being submitted to or allowed.

29.

That where the plaintiff is directed to pay to the defendant the costs of the suit, there the costs occasioned to a defendant by any amendment of the bill shall be deemed to be part of such defendant's costs in the cause (except as to any amendment which may have been made by special leave of the court, or which shall appear to have been rendered necessary by the default of such defendant); but

there shall be deducted from such costs any sum or sums which may have been paid by the plaintiff, according to the course of the court, at the time of any amendment.

30.

That when upon taxation a plaintiff who has obtained a decree with costs is not allowed the costs of any amendment of the bill, upon the ground of its having been unnecessarily made, the defendant's costs, occasioned by such amendment, shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff.

31.

That upon the allowance of any plea or demurrer, the plaintiff or plaintiffs shall pay to the defendant or defendants the taxed costs thereof; and when such plea or demurrer is to the whole bill, then the further taxed costs of the suit also; unless in the case of a plea the plaintiff or plaintiffs shall undertake to reply thereto, and then the costs shall be reserved, or unless the court shall think fit to make other order to the contrary.

32.

That upon the overruling of any plea or demurrer, the defendant or defendants shall pay to the plaintiff or plaintiffs the taxed costs occasioned thereby, unless the court shall make other order to the contrary.

33.

That when two counsel appear for the same party or parties upon the hearing of any cause or matter, and it shall appear to the master to have been necessary or proper for such party or parties to retain two counsel to appear, the costs occasioned thereby shall be allowed, although both of such counsel may have been selected from the outer bar.

34.

That when a cause which stands for hearing is called on to be heard, but cannot be decided by reason of want of parties or other defect on the part of the plaintiff, and is therefore struck out of the paper, if the same cause is again set down, the defendant or defendants shall be allowed the taxed costs occasioned by the first setting down, although he or they do not obtain the costs of the suit.

35.

That where a cause being in the paper for hearing is ordered to be adjourned upon payment of the costs of the day, there the party to pay the same, whether before the lord high chancellor, the master of the rolls, or the vice-chancellor, shall pay the sum of ten pounds, unless the court shall make other order to the contrary.

36.

That whenever upon the hearing of any cause or other matter it shall appear that the same cannot conveniently proceed, by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the court, and which according to its practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the court shall think fit to award.

37.

That the sworn clerks of the court and the waiting clerks shall not be entitled to receive any fees for attendance in court, except in cases where they shall actually attend, and where their attendance shall be necessary.

38.

That where any cause which is set down to be heard, either in the court of the lord chancellor, or in the court of the master of the rolls, shall be afterwards set down to be heard in the other of the said two courts, there the solicitor for the plaintiff shall certify the fact to the registrar of the court where the cause was first set down, who shall cause an entry thereof to be made in his book of causes, opposite to the name of such cause; and the solicitor for the plaintiff shall be allowed a fee of six shillings and eight pence for so certifying the fact, if he shall certify the same within eight days after the said cause is so set down a second time.

39.

That where any cause shall become abated, or shall be compromised after the same is set down to be heard in either of the said two courts, the solicitor for the plaintiff shall also certify the fact, as the case may be, to the registrar of the court where the cause is so set down, who shall in like manner cause an entry thereof to be made in his

cause-book, and the solicitor for the plaintiff shall be allowed the same fee of six shillings and eight pence for such certificate, if he shall certify the fact as soon as the same shall come to his knowledge.

40.

That the penal sum in the bond to be given as a security to answer costs by any plaintiff who is out of the jurisdiction of the court, be increased from forty pounds to one hundred pounds.

41.

That the deposit upon exceptions to a master's report shall be increased to ten pounds, to be paid to the adverse party, if the exceptions are overruled; in which case the exceptant shall also pay the further taxed costs occasioned by such exceptions, unless the court shall otherwise order; but in case the exceptant shall in part succeed, the deposit shall be dealt with and costs shall be paid as the court shall direct.

42.

That the deposit upon every petition of appeal or rehearing be increased to twenty pounds, to be paid to the adverse party when the decree or order appealed from is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, unless the court shall otherwise order.

43.

That for the purpose of enabling all persons to obtain precise information as to the state of any cause, and to take the means of preventing improper delay in the progress thereof, any clerk in court shall at the request of any person, whether a party or not in the suit or matter inquired after, procure and furnish a certificate from the six clerks' office, specifying therein the dates and general description of the several proceedings which have been taken in any cause in the said office, whether such clerk in court be or be not concerned as clerk in court in the cause; and that he shall be entitled to receive the sum of three shillings and four pence for such certificate, and no more.

44.

That whenever a person who is not a party appears in any proceeding, either before the court or before the master, service upon the

solicitor in London, by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service.

45

That clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may at any time before enrolment be corrected upon petition, without the form and expense of a rehearing.

46.

That every application to stay proceedings upon any decree or order which is appealed from, be made first to the judge who pronounced the decree or order.

47.

That every application for a new trial of any issue at law, directed by a judge of this court, be first made to the judge who directed such issue.

48.

That where any decree or order referring any matter to a master is not brought into the master's office within two months after the same decree or order is pronounced, there any party to the cause, or any other party interested in the matter of the reference, shall be at liberty to apply to the court by motion or petition, as he may be advised, for the purpose of expediting the prosecution of the said decree or order.

49.

That every master shall enter in a book to be kept by him for that purpose, the name or title of every cause or matter referred to him, and the time when the decree or order is brought into his office, and the date and description of every subsequent step taken before him in the same cause or matter, and the attendance or non-attendance of the several parties on each of such steps, so that such book may exhibit at one view the whole course of proceedings which is had before him in each particular cause and matter.

50.

That upon the bringing in of every decree or order, the solicitor bringing in the same shall take out a warrant, appointing a time which is to be settled by the master, for the purpose of the master taking into consideration the matter of the said decree or order, and shall serve the same upon the clerks in court of the respective parties, or upon the parties or their solicitors in cases where they shall have no clerks in court.

51.

That at the time so appointed for considering the matter of the said decree or order, the master shall proceed to regulate as far as may be the manner of its execution; as for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements, and to point out which of the several proceedings may be properly going on, *pari passu*, and as to what particular matters interrogatories for the examination of the parties appear to be necessary, and whether the matters requiring evidence shall be proved by affidavit or by examination of witnesses; and in the latter case, if necessary, to issue his certificate for a commission; and if the master shall think it expedient so to do, he shall then fix a certain time or certain times within which the parties are to take any certain proceeding or proceedings before him.

52.

That upon any subsequent attendance before him in the same cause or matter, the master, if he thinks it expedient so to do, shall fix a certain time or certain times within which the parties are to take any other proceeding or proceedings before him.

53.

That where some or one, but not all, the parties do attend the master at an appointed time, whether the same is fixed by the master personally or upon a warrant, there the master shall be at liberty to proceed *ex parte* if he think it expedient, considering the nature of the case, so to do.

54.

That where the master has proceeded *ex parte*, such proceeding shall not in any manner be reviewed in the master's office, unless the master, upon a special application made to him for that purpose by a party who was absent, shall be satisfied that he was not guilty of

wilful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance; such costs to be certified by the master at the time, and paid by the party or his solicitor before he shall be permitted to proceed on the warrant to review.

55.

That where a proceeding fails, by reason of the non-attendance of any party or parties, and the master does not think it expedient to proceed *ex parte*, there the master shall be at liberty to certify what amount of costs, if any, he thinks it reasonable to be paid to the party or parties attending, by the absent party or parties, or by his or their solicitor or solicitors, or clerk or clerks in court personally, as the master in his discretion shall think fit; and upon motion or petition, without notice, the court will make order for the payment of such costs accordingly.

56.

That where the party actually prosecuting a decree or order does not proceed before the master with due diligence, there the master shall be at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established his claim before the master under the decree or order, to commit to him the prosecution of the said decree or order; and from thenceforth, neither the party making default, nor his solicitor, shall be at liberty to attend the master as the prosecutor of the said decree or order.

57.

That upon any application made by any person to the court, the master, if required by the person making the application, shall, in as short a manner as he conveniently can, certify to the court the several proceedings which shall have been had in his office in the same cause or matter, and the dates thereof.

58.

That every master shall be at liberty, without order, to proceed in all matters *de die in diem* at his discretion.

59.

That every warrant for attendance before the master shall be considered as peremptory, and the master shall be at liberty to continue

the attendance beyond the hour and during such time as he thinks proper, and shall be empowered to increase the fee for the solicitor's attendance in proportion to the time actually occupied; and in case the master shall not be attended by the solicitor, or a competent person on behalf of the solicitor of any party, the master shall in such case disallow the usual fee for the solicitor's attendance, taking care in either allowing an increased fee, or disallowing the usual fee, to mark his determination in his attendance-book, and also on the warrant for attendance.

60.

That where by any decree or order of the court, books, papers, or writings are directed to be produced before the master for the purposes of such decree or order, it shall be in the discretion of the master to determine what books, papers, or writings are to be produced, and when and for how long they are to be left in his office; or in case he shall not deem it necessary that such books, papers, or writings should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient.

61.

That all parties accounting before the master shall bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the master shall direct.

62.

That all such accounts when passed and settled by the master shall be entered in a book to be kept for that purpose in the master's office, as is now the practice with respect to receivers' accounts; and with proper indexes, in order to be referred to as occasion may require.

63.

That the master, in acting upon the order of the court of 28th April, 1796, shall be at liberty upon the appointment of a receiver, or at any time subsequent thereto, in the place of annual periods for the delivery of the receiver's accounts and payment of his balances, to fix either longer or shorter periods at his discretion; and when

such other periods are fixed by the master, the regulations and principles of the said order shall in all other respects be applied to the said receiver.

64.

That in every order directing the appointment of a receiver of a landed estate, there be inserted a direction that such receiver shall manage, as well as set and let, with the approbation of the master; and that in acting under such an order it shall not be necessary that a petition be presented to the court in the first instance, but the master without special order shall receive any proposal for the management or letting of the estate from the parties interested, and shall make his report thereon, which report shall be submitted to the court for confirmation in the same manner as is now done with respect to reports on such matters made upon special reference; and until such report be confirmed, it shall not give any authority to the receiver.

65.

That all affidavits which have been previously made and read in court, upon any proceeding in a cause or matter, may be used before the master.

66.

That where upon an inquiry before the master affidavits are received, there no affidavit in reply shall be read, except as to new matter, which may be stated in the affidavits in answer; nor shall any further affidavits be read unless specially required by the master.

67.

That the master shall not receive further evidence as to any matter depending before him after issuing the warrant on preparing his report; but that he shall not issue such warrant without previously requiring the parties to show cause why such warrant should not issue.

68.

That no warrant to review any proceeding in the master's office shall be allowed to be taken out, except by permission of the master, upon special grounds to be shown to him for that purpose; and the costs of such review when allowed shall be in the discretion of the master, and shall be paid by and to such persons and at such time as he shall direct,

69.

That the master shall have power at his discretion to examine any witness *viva voce*; and in such case the subpoena for the attendance of the witness shall, upon a note from the master, be issued from the subpoena office; and that the evidence upon such *viva voce* examination shall be taken down by the master, or by the master's clerk in his presence, and preserved in the master's office, in order that the same may be used by the court if necessary.

70.

That in all matters referred to him, the master shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time as to him shall seem expedient; the costs of such separate reports to be in the discretion of the court.

71.

That where a master shall make a separate report of debts or legacies, there the master shall be at liberty to make such certificate as he thinks fit with respect to the state of the assets, and every person interested shall thereupon be at liberty to apply to the court as he shall be advised.

72.

That the master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require; the evidence upon such examination being taken down at the time by the master, or by the master's clerk in his presence, and preserved, in order that the same may be used by the court if necessary.

73.

That if any party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding before the master, on the ground that it is scandalous or impertinent, or that any examination taken in the master's office is insufficient, he shall be at liberty, without any order or reference by the court, to take out a warrant for the master to examine such matter, and the master shall have authority to expunge any such matter which he shall find to be scandalous or impertinent.

74.

That the master, in deciding on the sufficiency or insufficiency of any answer or examination, shall take into consideration the relevancy or materiality of the statement or question referred to.

75.

That in cases where estates or other property are directed to be sold before the master, the master shall be at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place and by such person as he shall think fit.

76.

That where a master is directed to settle a conveyance, or to tax costs in case the parties differ about the same, then the party claiming the costs, or entitled to prepare the conveyance, shall bring the bill of costs, or the draft of the conveyance, into the master's office, and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party shall have liberty to inspect the same without fee, and may take a copy thereof if he thinks fit; and at or before the expiration of the eight days, or such further time as the master shall in his discretion allow, he shall then either agree to pay the costs or adopt the conveyance, as the case may be, or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs, or to deliver a statement in writing of the alterations which he proposes in the draft of the conveyance. But if he make no such tender, nor deliver any such statement in writing, or if the other party refuses to accept the sum so tendered, or to adopt the proposed alterations in the draft of the conveyance, the master shall then proceed to tax the costs, or settle the conveyance, according to the practice of the court. And in case the taxed costs shall not exceed the sum tendered, or the master shall adopt the proposed alterations in the draft of the conveyance, then the costs of the taxation, or the costs of the proceeding with respect to the conveyance, shall be borne by the other party.

77.

That whenever in any proceeding before a master the same solicitor is employed for two or more parties, such master may at his discretion require that any of the said parties shall be represented before him by a distinct solicitor, and may refuse to proceed until such party is so represented.

78.

That such of the foregoing orders as limit or allow any specified time for any party to take any proceeding, or for any other purpose, shall only apply to cases where the period from which such specified time is to be computed shall be on or subsequent to the first day of Easter term next ensuing.

79.

That such of the foregoing orders as relate to the manner in which the costs of any suit or proceeding are to be taxed, and to the amount of costs to be paid on any occasion, shall not apply to any costs which have been incurred, or to the costs of any proceeding which shall have been had or taken previously to the first day of Easter term next ensuing.

80.

That such of the foregoing orders as relate to the course of proceeding in the offices of the masters of the court, or to the authority of the masters, shall have effect from and after the first day of Easter term next ensuing, and shall be acted upon by the masters in all cases, except where from the then advanced stage of any proceeding they are not practically applicable.

81.

That, subject to the regulations hereinbefore specified, the foregoing orders shall take effect as to all suits whether now depending or hereafter commenced, on the first day of Easter term next.

82.

And, whereas the present practice, that causes can only be entered for hearing during the time of term, and that the subpoena *ad audiendum judicium* can only be then returnable, is productive of great delay and inconvenience: It is hereby further ordered by the said lord high chancellor, with the advice and assistance aforesaid, that from henceforth causes may be set down for hearing, and the subpoenas *ad audiendum judicium* served and returnable on any day as well out of term as in term, and this order is to be called the LXXXII order:

And it is hereby further ordered, that the aforesaid eighty-second order shall take effect immediately, and the aforesaid amended orders shall take effect on the first day of Hilary term next (1832).

ORDERS OF DECEMBER 21, 1833.¹

1.

That all writs of subpoena in this court shall be prepared by the solicitor of the party requiring the same; and that the seal for sealing the same shall be marked or inscribed with the words "Subpœna Office, Chancery,"—and such writs shall be in the forms mentioned at the foot of these orders, or as near as may be, with such alterations and variations as circumstances may require.

2.

That a *præcipe* in the usual form, and containing further the particulars hereinafter mentioned (as to the names and residences of the solicitors issuing the same), shall, in all cases, be delivered and filed at the subpoena office. And that on a subpoena for costs being sealed, the certificate or report shall be produced to the officer sealing the writ as his authority for sealing it.

3.

That the name or firm, and the place of business or residence, of the solicitor or solicitors issuing a subpoena shall be indorsed thereon; and where such solicitors shall be agents only, then there shall be further indorsed thereon the name or firm, and place of business or residence, of the principal solicitor or solicitors.

4.

That the service of subpoenas shall be effected by delivering a copy of the writ and of the indorsement thereon, and at the same time producing the original writ; and that in all cases where a subpoena might heretofore have been served by leaving the body thereof at the party's dwelling-house or otherwise than personally, it shall be sufficient to leave a copy of such subpoena in the same manner, producing the original writ to the person with whom such copy shall be so left.

5.

That every subpoena, other than a *subpœna duces tecum*, shall contain three names where necessary or required; and that a gross sum or fee of 12s. 6d. shall be the amount allowed in costs for every *subpœna duces tecum*, including the *præcipe*, attendance, and sum paid for

¹See 2 Smith Ch. Pr. (2d ed.) 472-487; 2 Bates Fed. Eq. Proc. 1147-1160.

sealing, and 5s. 10d. each for all other subpoenas; in addition to which last-mentioned sum, the solicitor suing out the same shall be allowed one fee of 6s. 8d. for the *præcipes* and attendance on sealing such subpoenas as heretofore, where the number of names included therein shall not exceed nine; and if they shall exceed nine in number, then an additional fee of 6s. 8d.; and if they exceed eighteen, a further fee of 6s. 8d.; and so in proportion for every additional number of nine names included in such subpoenas.

6.

That no more than three persons shall be included in one *subpoena duces tecum*, and that the party suing out the same shall be at liberty to sue out a subpoena for each person if it shall be deemed necessary or desirable, and that the sum of 12s. 6d. shall be allowed in costs for every such subpoena, including the *præcipe*, attendance, and sum paid for sealing the same.

7.

That the time for serving any subpoena (except for costs) shall be limited to the last day of the term next following the term or vacation in which it was sued out; and that in the interval between the suing out and service of any subpoena, the party suing out the same shall be at liberty to correct any error in the names of parties or witnesses and to have the writ resealed, upon payment to the clerk at the subpoena office of a fee of 1s., and at the same time leaving a corrected *præcipe* of such subpoena marked "altered and resealed," and signed with the name and address of the solicitor or solicitors suing out the same.

8.

That when any defendant has been taken into custody upon attachment or other process for want of appearance to a bill of revivor, and such defendant shall have been taken thereon, and shall refuse or neglect to enter an appearance to such bill within eight days after the return of such attachment, the plaintiff shall be entitled as of course, upon motion or petition, to the common order to revive; and if the defendant cannot be found so as to be taken upon such attachment, and a return of "*non est inventus*" shall have been made thereon, the plaintiff shall, upon producing such return, and an affidavit that due diligence has been used in endeavoring to execute such attachment, and that there was good reason to believe that the defend-

ant was in the county to which such attachment issued at the time of suing out the same, be also entitled as of course, upon motion or petition, at the end of eight days after the return of such attachment, to obtain the common order to revive, and that, in either of such cases, the order shall recite, as the ground for granting the same, that the defendant is in contempt, and that the time limited by the court to show cause against reviving the suit has expired.

9.

That a defendant shall be at liberty, without order, to sue out a *deditus* to take his plea, answer, or demurrer (not demurring alone) in the country, on giving two days' notice in writing to the plaintiff's clerk in court to give commissioners' names to see the same taken, and in default thereof the defendant shall be at liberty to sue out the same, directed to his own commissioners; and in case of severe illness or other bodily infirmity, whereby a defendant, resident not more than four miles from Lincoln's Inn Hall, shall be unable to travel or leave home, he shall, upon affidavit first made thereof and duly filed, be entitled to such *deditus* as aforesaid, on such notice first given as hereinbefore directed.

10.

That in every cause where an original or supplemental bill, or bill of revivor, has been filed subsequent to the 25th day of November last, or shall hereafter be filed, a defendant shall, after appearance and without order, be allowed eight weeks in a town cause, and ten weeks in a country cause, to plead, answer, or demur, not demurring alone, to any such original or supplemental bill, or any such bill of revivor, to which an answer is required; and five weeks in a town cause, and seven weeks in a country cause, to plead, answer, or demur, not demurring alone, to any amended bill, to which the plaintiff shall require an answer, but that twelve days only shall be allowed a defendant to demur alone to any such original, amended, or supplemental bill, or bill of revivor. And in every cause for an injunction to stay proceedings at law, if the defendant do not plead, answer, or demur to the plaintiff's bill within eight days after appearance, the plaintiff shall be entitled, as of course, upon motion, to such injunction, and if the defendant shall not, within eight days after appearance to a bill of revivor, show cause by plea, answer, or demurrer filed, the plaintiff shall be entitled, as of course, upon motion or petition, to the common order to revive, which order shall recite as the ground for grant-

ing the same, that the time limited by the court to show cause against reviving the suit has expired.

11.

That where a common injunction for want of answer is awarded, the order shall recite, as the ground for granting the same, that the defendant has omitted to put in his answer, plea, or demurrer, within the time limited by the court in that behalf.

12.

That where a defendant is in contempt to an attachment for want of appearance, the interval between the day fixed by the subpoena for appearance, and that on which the same is actually entered, shall be deducted from the time hereinbefore allowed to a defendant to plead, answer or demur, not demurring alone, to the plaintiff's bill.

13.

That the day on which an order for the plaintiff to give security for costs is served, and the period from thence to and including the day on which such security is given, shall not be reckoned in the computation of the time allowed a defendant to plead, answer, or demur.

14.

That where the plaintiff obtains an order to amend without requiring any further answer, and shall amend the bill any otherwise than by an alteration of names, dates, or sums, or the correction of clerical errors, only, the defendant shall, as of course, have eight days' time to consider whether it is necessary for him or her to answer the same, at the end of which time the plaintiff shall be at liberty to file a replication, or set down the cause for hearing on bill and answer, unless the defendant shall have previously served an order for time to answer, or taken out and served a warrant for time to answer such amended bill, in which last case the master may allow the defendant such time (if any) for that purpose, as he shall think fit.

15.

That as to all bills, whether original, amended, supplemental, or of revivor, now filed or to be filed, whenever a party may desire to make an application to a master under the said act, or under these orders, or whenever it shall be necessary to make any reference to any master,

and no previous application or reference to any master has been made in the said cause, the name of the master in rotation shall be ascertained, and entered in books to be kept as after directed in the manner hereinafter mentioned, and all applications authorized by the said recited act, or by these orders, to be made to a master, and every such reference as aforesaid, shall be made to the said master in rotation.

16.

That as to all bills which shall have been filed before this day, where any reference has been made in the cause, the name of the master to whom the last reference was made in such cause, shall, at the request of either of the parties thereto, or of his or her solicitor, and on producing such order of reference, with the master's name certified thereon, or appearing therein, be added by the six clerks to the original entry of the cause in the six clerks' book and entered in the book to be kept as hereinafter directed before any application under the said recited act shall be made in that cause, and all such applications, and all such references as aforesaid, shall be made to such last-mentioned master.

17.

That in all cases where it shall become necessary to ascertain the name of the master in rotation for the purposes of the two preceding or any succeeding orders, one of the six clerks shall give to the solicitor for the plaintiff or defendant requiring the same a certificate of the bill filed, which certificate shall, on the same or the following day, be marked by the master of the day at the public office in chancery, with the name of the master in rotation for such cause; and such certificate so marked (having first been produced to the said master in rotation, who shall cause a minute thereof to be taken), shall, on the same day, be returned to the six clerk, and filed by him; and he shall add the name of such master to the original entry of the cause in the six clerks' book, and shall also cause the name of the cause, and of such master, to be entered in a book to be kept by the six clerks for that purpose in the six clerks' office, and which shall be open to inspection at all times during office hours without fee.

18.

That where a defendant who is not in contempt, or has not entered his appearance with the registrar in manner hereinafter mentioned, submits to answer exceptions taken to a first answer before any order

to refer the same has been obtained, he shall be allowed, as of course, and without order, four weeks in a town cause, and six weeks in a country cause, to put in a further answer thereto; but if such order of reference has been obtained and served prior to such submission, then the master to whom the reference has been made shall fix the time which shall be allowed the defendant to put in such further answer.

19.

That the master to whom any exceptions to an answer for insufficiency shall be referred, shall be at liberty, in making a report upon such exceptions, if he shall think fit, to certify by whom and in what proportions (if any) the costs of such exceptions and of the reference thereon ought to be borne, and that upon the taxation of the general costs in the cause under the twenty-eighth order, pronounced on the 3d of April, 1828, regard shall be had to such certificate, and the costs to be allowed to either party shall be taxed and apportioned accordingly.

20.

That all special applications for leave to withdraw replication, as well as to amend bill, shall be heard and determined by such master in rotation, and such applications, and all other special applications under the said recited act, shall be made by taking out a warrant, at the foot whereof a notice shall be written specifying the object of the application, and the same shall be served two clear days before the return thereof.

21.

That in every order granted by a master for further time to answer, it shall be made a condition of such order, that the defendant shall enter his appearance with the registrar and consent to a serjeant-at-arms, as in the case of a commission of rebellion returned—"non est inventus," unless under any special circumstances the said master shall otherwise direct, and which circumstances shall be shortly stated in the order.

22.

That all orders to refer an answer, or other pleading or matter depending before the court for scandal or impertinence, shall contain a direction to the master to expunge any such scandalous or imper-

tinent matter as he shall certify to be contained therein, and which shall have been the subject of the reference; and the master shall be at liberty, without further order, to tax the costs of such reference and consequent thereon, and to direct by whom the same shall be paid, and the same shall be recoverable by subpoena; but such scandalous or impertinent matter shall not be expunged, nor costs taxed, until the expiration of four days from the filing of the report of such scandal or impertinence, in order that the adverse party may have an opportunity to file exceptions to such report.

23.

That the said masters shall, on all applications to them, or either of them, by warrant under the said recited act, or under these orders or either of them, be at liberty to direct, and shall, accordingly, in the orders made thereon, order and direct whether the costs of the application shall be costs in the cause, or whether such costs, or any part thereof, shall be paid by any of the parties personally; and in the latter case, the said masters respectively shall, in such orders, either fix the sum to be paid for such costs, or tax the same at their discretion; and the party to whom such costs are directed to be paid, shall be entitled to sue out a subpoena for the same.

24.

That the master to whom any such application or reference as aforesaid shall be made, shall draw up the orders thereon in a short form, and the same, when signed by him, shall be entered in a book to be kept for that purpose in the office of such master, and shall then be marked by the said master, or his chief clerk, as entered, and he shall sign his initials thereto in this form: "Ent. A. B.;" and the said orders shall then be binding, (unless reversed or varied on appeal), and shall be enforced in like manner as if made by the court; and the original order, or any duplicate thereof, which the master is directed to grant on the application of any party, so signed and entered as aforesaid, shall be a sufficient warrant to every officer of the court to do the act therein mentioned, or to permit the same to be done; and each party shall be at liberty to inspect the entry of all such orders in the said entering book, without fee.

25.

That in case it shall become necessary to make any application to a master under the said recited act during the period between the

last seal after Trinity term, and the seal next before Michaelmas term, such application shall be made to the sitting master of the vacation, and his decision and order thereon shall be equally binding, and acted upon and enforced in the same way and manner as if made by the master in rotation, to whom the same has or ought otherwise to have been referred; but all subsequent applications and all references in the cause shall be made to such master in rotation.

26.

That a defendant shall not be at liberty to serve a notice of motion to dismiss for want of prosecution, until after the time, limited by the rules of the court within which a plaintiff may obtain an order to amend as to such defendant, shall have expired, any thing in any former order contained to the contrary notwithstanding.

27.

That each registrar shall attend in succession the three several courts of the lord chancellor, the master of the rolls, and the vice-chancellor.

That for the purpose of avoiding, as much as may be, expense and delay in the drawing of the decrees and orders of this court, it is hereby directed that, except in orders for special injunctions, in which the usual recitals shall be inserted as heretofore, neither the bill, nor answers, nor any part thereof, be stated or recited in the original decree or order, and that no part of the master's report be stated in any decree upon further directions, except the master's finding, or opinion upon the subject referred to him; and that in orders made upon petitions no part of the petition be stated or recited except the prayer; and that the same principle of brevity be observed in all the orders of this court made upon motion, so far as may be consistent with a statement explaining the grounds upon which the order is made. And for the better understanding of this order, certain forms of decrees and orders drawn pursuant hereto are subjoined. And it is hereby directed that such forms shall be observed in all cases as nearly as may be, and that before any order made on a petition be passed, the original petition be filed with the clerk of the reports.

28.

That in all cases where any sums of money or any securities or other effects belonging to the suitors of the court of chancery shall

be directed to be paid into or deposited in the Bank of England in the name and with the privity of the accountant general of the said court; and in all cases where any such sum of money or any securities or other effects be directed to be paid out, or invested in the purchase of securities, transferred or carried over or delivered out, the exact sum of money and amount of securities so to be paid out, invested, transferred, or carried over, be ascertained by the registrar and specified and expressed in the order of court in words written at length, except in the case of residues of money or securities remaining after a portion directed to be applied for particular purposes, the amount of which cannot be ascertained at the time of making the said order, in which cases the order shall direct that the amount of such residues and shares of residues shall be ascertained and specified by affidavit.

And that in all cases where a residue of cash or securities shall be directed by any order to be operated upon by the accountant general, the exact amount of such residue, where the same can be done, shall be ascertained by the registrars, and expressed and specified in the order in words at length, so that the amount of such residue shall appear on the face of the order.

And that all persons (whether representatives or others) who shall be directed to pay in, transfer, or deposit any sum of money, securities, or other effects in the name of the accountant general, and all persons (whether representatives or others) to whom any sums of money, securities, or other effects, shall be directed to be paid out, transferred, carried over, or delivered out by the accountant general, shall be described by name, except in the case of bodies corporate, companies, or societies, in such order, and not merely as plaintiffs or petitioners, or the like; except in cases of payments, transfers, or carryings over, directed to be made to or by representatives, where no probate or letters of administration shall have been taken out at the time of making such orders, and the Christian and surnames or titles of honor of all such persons, and the titles of all such bodies corporate, companies, and societies, shall be written at length and without abbreviations in such orders.

That in all orders directing the payment of dividends and annuities, the time when the first of such payments shall be made, and when all subsequent periodical payments, whether quarterly, half-yearly, yearly, or otherwise, shall be made, shall be specified and expressed in words at length.

That all orders, directing the laying out of sums of money of uncertain amount in the purchase of securities, do direct that such investments shall be made when the money shall amount to a competent sum, and not sooner.

That in all cases where it shall be referred to a master of the court of chancery to ascertain and apportion the amount of money or securities to be paid into the Bank of England, in the name and with the privity of the accountant general, or of any securities to be carried over or transferred to the accountant general, or to ascertain or apportion the amount of money to be paid out or invested in the purchase of securities to be paid out, or of securities to be sold, carried over, or transferred by the accountant general, the exact amount of such money or securities respectively shall be ascertained by the masters, and stated in the report in words at length; except in the case of residue of money or securities remaining after a portion directed to be applied to certain purposes, and the amount of which portions cannot be ascertained at the time of making such report, in which case the amount of such residue and portions shall be ascertained by affidavit.

And that in all cases where a residue of cash or securities shall be directed by an order to be operated upon by the accountant general, the exact amount of such residue, where the same can be done, shall be ascertained by the masters, and expressed and specified in the order in words at length, so that the amount of such residue shall appear on the face of the order.

And in all such cases, the person by or to whom money is to be paid, or securities carried over or transferred as aforesaid, shall be described by name, except in the case of bodies corporate, companies, or societies, in such reports, and not merely as plaintiffs or petitioners or the like, except in the cases of payments, transfers, or carryings over, directed to be made to or by representatives, where no probate or letters of administration shall have been taken out at the time of making the said report, and the Christian and surnames, or titles of honor of all such persons, and the titles of all such bodies corporate, companies, and societies shall be written at full length in the said report.

20.

That with a view to the convenience of the suitors and their solicitors, and for the purpose of diminishing the expense of orders on petitions of course, which, according to the practice of the court,

may be presented to the master of the rolls, one of the secretaries of the master of the rolls shall, upon any such petitions of course (except upon petitions for setting down causes to be reheard), which shall be presented to his honor, instead of answering such petitions as heretofore, draw up the orders thereon in such form as the master of the rolls shall from time to time direct, every such order to be signed as passed with the initials of such secretary; and the under secretary shall enter, or cause to be entered, every such order in a book to be kept at the secretary's office at the rolls for that purpose, and shall then mark and sign such order with his initials, as entered; and the suitors of the court and their solicitors shall have access to the said book, during office hours, without the payment of any fee; and for every such order so to be made, as aforesaid, there shall be paid the same fees as have hitherto been payable in respect of such petitions as aforesaid, in lieu of the fees on such petitions. And there shall be also paid to the chief secretary, for filing every such petition, the sum of 1*s.*; and to the under secretary, for entering every such order, the sum of 6*d.* And every such order so to be made as aforesaid, shall have the same force and effect as orders of course passed by the registrars now have, and without the payment of the fees heretofore payable on such orders at the registrar's office; and for every office copy that may be required of any such order, there shall be paid to the chief secretary (who shall mark the same as examined, and authenticate it by affixing his initials thereto) the sum of 6*d.*, and no more, for making the same.

30.

That the duties to be performed in the office of the master of reports and entries shall be carried on as the same were heretofore done by the master of the report office; and that all decrees and orders of the High Court of Chancery shall be entered by the clerks of entries under the direction of the master of reports and entries.

That proper calendars or indexes shall be kept by the clerks of entries, so that the same may be conveniently referred to when required; and such calendars or indexes, and the books of entries, shall, at all times during office hours, be accessible to the public, on payment of the usual fees.

That all reports, and exceptions to reports and petitions, shall be left with the clerk of reports, to be by him filed or preserved under the direction of the master of reports and entries; and all office copies thereof, or of any part thereof, that may be required, shall

be ready to be delivered to the party requiring the same within forty-eight hours after the same shall be bespoken; and that all decrees shall be entered within one week after the same shall be left for entry, and that all such entries shall be examined by one of the clerks of entries, and be marked with his initials, to denote such examination.

That proper indexes or calendars to the files or bundles of the reports, and exceptions to reports and petitions, shall be kept, so that the same may be conveniently referred to when required; and such calendars and indexes, and the said original reports and exceptions to reports and petitions, shall, at all times during office hours, be accessible to the public, on payment of the usual fees.

That, in addition to such calendars, the said clerks of reports shall enter in a book, to be kept by them for that purpose, the time when any report and set of exceptions is delivered to them to be filed, with the name of the cause and the date of the report, and, as regards exceptions, the names of the parties excepting, and such book shall, at all times during office hours, be accessible to the public.

31.

That all office copies in all the offices of the court shall be written on foolscap paper bookwise, and shall contain two folios in each page, except as to office copies of bills, which shall contain only one folio, such folios to consist of ninety words each, and to be reckoned as to schedules according to the manner directed by the general order of this court, bearing date the 28th day of November, 1743.

32.

That the last interrogatory now commonly in use be in future altered, and shall stand and be in the words or to the effect following: "Do you know, or can you set forth, any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause; if yea, set forth the same," etc.

33.

That the masters extraordinary of this court shall be at liberty in future to take any affidavit, or do any other act incident to the office of master extraordinary in chancery, at any place which is distant

not less than ten miles from the Hall in Lincoln's Inn, any existing order to the contrary notwithstanding.

34.

That the fees set forth in the schedule after stated shall constitute the schedule of fees to be received by the masters and their clerks, and the registrars and their clerks, under the said recited act.

35.

That, except as may be herein otherwise directed, the offices of this court shall continue open for the despatch of business, and the officers and clerks belonging thereto shall attend in such offices in the discharge of their business, during such times and for such number of hours in each day as they have hitherto done under any existing order or practice of the said court.

36.

That the office of the clerk of the affidavits and of the patentee of the subpoena office, be open from the hour of ten in the forenoon until four in the afternoon, and during the sitting of either of the courts, from the hour of seven to eight in the evening, except that from the 1st of September to the 20th of October those offices shall be open only from eleven to one o'clock.

That all copies of affidavits be ready for delivery within forty-eight hours after any copy shall be bespoken.

ORDERS OF MAY 9, 1839.¹

1.

That in all cases in which it shall be alleged that the plaintiff is prosecuting the defendant, in this court and also in some other court, for the same matter, the defendant in eight days after filing his answer or further answer to the plaintiff's bill, shall be entitled, as of course, on motion or petition, to the usual order for the plaintiff to make his election in which court he will proceed, with the usual directions in that behalf, unless the plaintiff shall, before the expiration of the same eight days, have delivered exceptions to the defendant's answer, or have referred his further answer on former exceptions. And in case the plaintiff shall have delivered such exceptions,

¹ See 2 Bates Fed. Eq. Proc. 1161-1163,
Eq. Prac. Vol. III.—110.

or referred the defendant's further answer within such time, the defendant shall be at liberty, by notice in writing to be served on the plaintiff's clerk in court, to require the plaintiff to procure the master's report on such exceptions, within four days from the service of such notice. And if the plaintiff, being so served with such notice, shall not procure the master's report in four days accordingly, or if the exceptions shall not be allowed, the defendant shall then be entitled, as of course, on motion or petition, to the usual order for the plaintiff to elect in which court he will proceed, with the usual directions. But in either of such cases, the plaintiff shall be at liberty to move that such order may be discharged on the merits confessed in the answer.

2.

That the plaintiff in any injunction cause having obtained the common injunction to stay proceedings at law, may (either before or after the answer of the defendant shall be put in, and whether such injunction shall or shall not have been continued to the hearing of the cause) obtain an order, as of course, for leave to amend the bill without prejudice to the injunction; but that such order shall contain an undertaking by the plaintiff to amend the bill within one week after the date of the order and in default thereof the order shall become void. And that in case the bill shall be amended pursuant to such order, the defendant shall thereupon, and although he may not have put in his answer to the bill or the amendments thereof, be at liberty to move the court on notice, to dissolve the injunction, on the ground that the bill as amended does not, even if the amendments be true, entitle the plaintiff thereto.

3.

That in case an injunction to stay proceedings at law shall be prayed for by the bill, and shall either not be obtained, or, having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill, and the defendant shall not plead, answer or demur to the amended bill within eight days after appearance, the plaintiff shall be entitled to move for an injunction, upon affidavit of the truth of the amendments.

4.

That foreclosure causes, when ready for hearing, may be ordered to be advanced for hearing, under the same circumstances, and sub-

jects to the same rules as other causes may be ordered to be so advanced.

5.

That in all cases in which it shall appear that certain preliminary accounts and inquiries must be taken and made, before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff shall be at liberty, at any time after the defendants shall have appeared to the bill, to move the court on notice, that such inquiries and accounts shall be made and taken; and that an order referring it to the master to make such inquiries, and take such accounts, shall thereupon be made, without prejudice to any question in the cause, if it shall appear to the court that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto, and that the same is consented to by such (if any) of the defendants, as being competent to consent, have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon the statements contained in the answers of, such (if any) of the defendants as have answered the bill.

6.

That whenever any order of course obtained from the master of the rolls, in any cause marked for or set down to be heard before the lord chancellor pursuant to the general order of the 5th day of May, 1837, shall be alleged to have been irregularly obtained, any application to discharge the same for irregularity shall in the first instance be made to the master of the rolls, and such cause and all other applications to be made therein, shall nevertheless continue subject to all the regulations of the said general order, as if this order had not been made.

ORDERS OF MAY 10, 1839.¹

1.

That every person, to whom in any cause or matter pending in this court, any sum of money or any costs have been ordered to be paid, shall, after the lapse of one month from the time when such order for payment was duly passed and entered, be entitled by his clerk in court to sue out one or more writ or writs of *fieri facias*, or writ or writs

¹ See 2 Bates Fed. Eq. Proc. 1163-1164.

of *elegit*, of the form hereinafter stated, or as near thereto as the circumstances of the case may require.

2.

That upon every such order hereafter to be entered, the entering clerk of this court, in whose division the same may be, shall, at the request of the party leaving the same, mark the day of the month and year on which the same shall be so left for entry, and no writ of *fieri facias* or *elegit* shall be sued out upon any such order, unless the date of such entry shall be so marked thereon as aforesaid.

3.

That such writs, when sealed, shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior courts of common law belongs, and shall be executed by such sheriff or other officer, as nearly as may be, in the same manner in which he doth or ought to execute such like writs; and such writs, when returned by such sheriff or other officer, shall be delivered to the clerks in court, by whom respectively they were sued out, or be left at their respective seats, and shall thereupon be filed as of record in the office of the six clerks of this court. And that for the execution of such writs, such sheriff or other officer shall not take or be allowed any fees, other than such as are or shall be from time to time allowed by the lawful authority, for the execution of the like writs issuing out of the superior courts of common law.

4.

That if it shall appear upon the return of any such writ of *fieri facias* as aforesaid, that the sheriff or other officer hath by virtue of such writ seized but not sold any goods of the person ordered to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs is payable, shall, immediately, after such writ with such return shall be filed as of record, be at liberty by his clerk in court to sue out a writ of *venditioni exponas* in the form herein-after stated, or as near thereto as the circumstances of the case may require.

5.

That on every such writ of *fieri facias* and *elegit* so to be issued as aforesaid, there shall be indorsed the words, "By the court," and also thereunder the calling and place of residence of the party against

whom such writ shall be issued, and also the name and residence or place of business of the solicitor at whose instance the same shall be issued, and the name of the clerk in court issuing the same, and that every such writ be also indorsed for the sum to be levied according to the form used upon like writs issuing out of the superior courts of common law.

6.

That for every such writ of *fieri facias* or *venditioni exponas* so to be issued as aforesaid, there shall be allowed to the clerk in court issuing the same the sum of eighteen shillings and sevenpence, and for every such writ of *elegit* the sum of one pound ten shillings, and that there be allowed to the solicitor at whose instance any such writ of *fieri facias*, *elegit*, or *venditioni exponas* shall be issued, the sum of six shillings and eightpence for instructions for the said writ, and that there be also allowed to such solicitor the further sum of six shillings and eightpence for attending to procure a warrant, and for attending to instruct the officer charged with the execution of such writ.

ORDERS OF AUGUST 26, 1841.¹

1.

That there shall forthwith be prepared a proper alphabetical book for the purposes after mentioned, and that such book shall be called the solicitors' book, and shall be publicly kept at the office of the six clerks, to be there inspected without fee or reward.

2.

That every solicitor, before he practice in this court, in his own name solely, and not by an agent, whose name shall be duly entered as after mentioned, and every solicitor, before he practice as such agent, shall cause to be entered in the solicitors' book in alphabetical order, his name and place of business, or some other proper place in London, Westminster, or the borough of Southwark, or within two miles of Lincoln's Inn Hall, where he may be served with writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications in causes and matters depending in this court; and as often as any such solicitor shall change his place of

¹ See Craig & Phillips' Reports, 366-382; 2 Bates Fed. Eq. Proc. 1176-1188.

business or the place where he may be served as aforesaid, he shall cause a like entry thereof to be made in the solicitors' book; and that the above-mentioned entries shall be made in such book by the said six clerks, who shall be entitled to a fee of 1s. for every such entry; and that the fund arising from such payment shall be applied, in the first instance, in paying the expenses of providing and keeping such book.

3.

That all writs, notices, orders, warrants, rules, and other documents, proceedings and written communications, which do not require personal service upon the party to be affected thereby, shall be deemed sufficiently served if such document, or a copy thereof, as the case may be, shall be left at the place lastly entered in the solicitors' book by the solicitor of such party; and if any solicitor shall neglect to cause such entry to be made in the solicitors' book as is required by the second order, then the fixing up a copy of any such writ, notice, order, warrant, rule, or other document, proceeding, or written communication for such solicitor in the said six clerks' office, shall be deemed a sufficient service on him, unless the court shall, under special circumstances, think fit to direct otherwise.

4.

That if any solicitor shall give his consent in writing that the service of all or any writs, notices, orders, warrants, rules, or other documents may be made upon him through the postoffice or otherwise, such service shall be deemed sufficient if made in such manner as such solicitor shall have so agreed to accept; but it shall be competent for any solicitor giving such consent, at any time to revoke the same by notice in writing.

5.

That no person shall be allowed to appear or act, either in person, by solicitor or counsel, or to take any proceedings whatever in this court, either as plaintiff, defendant, petitioner, respondent, party intervening, or otherwise, until an entry of the name of his solicitor and his solicitor's agent, if there be one, or if he act in person, his own name, and address for service shall have been made in the solicitors' book at the office of the six clerks; but if such address of any person so acting in person shall not be within London, Westminster, or the borough of Southwark, or within two miles of Lincoln's Inn Hall,

then all services upon such person, not requiring to be made personally, shall be deemed sufficient if a copy of the writ, notice, order, warrant, rule, or other document to be served, be transmitted to him through Her Majesty's postoffice, to such address as aforesaid.

6.

That no writ of attachment with proclamations, nor any writ of rebellion, be hereafter issued for the purpose of compelling obedience to any process, order, or decree of the court.

7.

That no order shall hereafter be made for a messenger, or for the serjeant-at-arms, to take the body of the defendant for the purpose of compelling him to appear to the bill.

8.

That if the defendant, being duly served with a subpoena to appear to and answer the bill, shall refuse or neglect to appear thereto, the plaintiff shall, after the expiration of eight days from such service, be at liberty to apply to the court for leave to enter an appearance for the defendant. And the court, being satisfied that the subpoena has been duly served, and that no appearance has been entered by the defendant, may give such leave accordingly; and that thereupon the plaintiff may cause an appearance to be entered for the defendant. And thereupon such further proceedings may be had in the cause as if the defendant had actually appeared.

9.

That upon the sheriff's return, "*non est inventus*," to an attachment issued against the defendant for not answering the bill, and upon affidavit made that due diligence was used to ascertain where such defendant was at the time of issuing such writ, and in endeavoring to apprehend such defendant under the same, and that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued, the plaintiff shall be entitled to a writ of sequestration in the ~~same~~ manner that he is now entitled to such writ, upon the like return made by the serjeant-at-arms.

10.

That no writ of execution nor any writ of attachment shall hereafter be issued for the purpose of requiring or compelling obedience to any order or decree of the High Court of Chancery; but that the party required by any such order to do any act shall, upon being duly served with such order, be held bound to do such act in obedience to the order.

11.

That if any party who is by an order or decree ordered to pay money, or do any other act in a limited time, shall, after due service of such order, refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such order shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a serjeant-at-arms, and such other process as he hath hitherto been entitled to upon a return, "*non est inventus*," by the commissioners named in a commission of rebellion issued for non-performance of a decree or order.

12.

That every order or decree requiring any party to do an act thereby ordered, shall state the time after service of the decree or order within which the act is to be done; and that upon the copy of the order, which shall be served upon the party required to obey the same, there shall be indorsed a memorandum, in the words, or to the effect following, viz.: "If you, the within named A. B., neglect to perform this order by the time therein limited, you will be liable to be arrested by the serjeant-at-arms attending the High Court of Chancery; and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order."

13.

That upon due service of a decree or order for delivery of possession, and upon proof made of demand and refusal to obey such order, the party prosecuting the same shall be entitled to an order for a writ of assistance.

14.

That the memorandum at the foot of the subpoena to appear and answer, shall hereafter be in the form following; that is to say.—

"Appearances are to be entered at the six clerks' office in Chancery Lane, London; and if you do not cause your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you; and you will be subject to an attachment and the other consequences of not answering the plaintiff's bill, if you do not put in your answer thereto within the time limited by the General Orders of the court for that purpose."

15.

That every person not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause.

16.

That a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

17.

That the interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say,— "The defendant A. B. is required to answer the interrogatories numbered respectively, 1, 2, 3, etc.;" and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

18.

That the note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

19.

That instead of the words of the bill now in use preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say,—

- " 1. Whether, etc.
- " 2. Whether, etc."

20.

That a defendant in a country cause shall be allowed no further time for pleading, answering, or demurring to any original or supplemental bill, or bill of revivor, or to any amended bill, than is now allowed to a defendant in a town cause.

21.

That after the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to an original bill, if the defendant shall have filed no plea, answer, or demur, the plaintiff shall be at liberty to file a note at the six clerks' office to the following effect: "The plaintiff intends to proceed with his cause as if the defendant had filed an answer, traversing the case made by the bill, and the plaintiff had replied to such answer, and served a subpoena to rejoin." And that a copy of such note shall be served on such defendant in the same manner as a subpoena to rejoin is now served, and such note when filed (a copy thereof being so served) shall have the same effect as if the defendant had filed an answer, traversing the whole of the bill, and the plaintiff had filed a replication to such answer, and served a subpoena to rejoin. And after

such note shall have been so filed, and a copy served as aforesaid, the defendant shall not be at liberty to plead, answer, or demur to the bill without the special leave of the court.

22.

That a plaintiff shall not be at liberty to file a note under the twenty-first order, until he has obtained an order of the court for that purpose, which order shall be applied for upon motion, without notice, and shall not be made unless the court shall be satisfied that the defendant has been served with a subpoena to appear and answer the bill, and that the time allowed to the defendant to plead, answer, or demur, not demurring alone, has expired.

23.

That where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to and answer the bill. But the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, whether the same be an original, or amended, or supplemental bill, omitting the interrogating part thereof; and such bill as against such party, shall not pray a subpoena to appear and answer, but shall pray that such party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause. But this order is not to prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to and answer the bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit.

24.

That where a plaintiff shall serve a defendant with a copy of the bill under the twenty-third order, he shall cause a memorandum of such service, and of the time when such service was made, to be entered in the six clerks' office, first obtaining an order of the court for leave to make such entry, which order shall be obtained upon motion without notice, upon the court being satisfied of a copy of the bill having been so served, and of the time when the service was made.

25.

That where a defendant shall have been served with a copy of the bill under the twenty-third order, and a memorandum of such service

shall have been duly entered, and such defendant shall not within the time limited by the practice of the court for that purpose, enter an appearance in common form, or a special appearance under the twenty-seventh order, the plaintiff shall be at liberty to proceed in the cause, as if the party served with a copy of the bill were not a party thereto, and the party so served shall be bound by all the proceedings in the cause, in the same manner as if he had appeared to and answered the bill.

26.

That where a party shall be served with a copy of the bill under the twenty-third order, such party, if he desires the suit to be prosecuted against himself in the ordinary way, shall be entitled to have it so prosecuted; and in that case he shall enter an appearance in the common form, and the suit shall then be prosecuted against him in the ordinary way; but the costs occasioned thereby shall be paid by the party so appearing, unless the court shall otherwise direct.

27.

That where a party shall be served with a copy of the bill under the twenty-third order, and shall desire to be served with a notice of the proceedings in the cause, but not otherwise to have the same prosecuted against himself, he shall be at liberty to enter a special appearance under the following form; that is to say, "A. B. appears to the bill for the purpose of being served with notice of all proceedings therein." And thereupon, the party entering such appearance shall be entitled to be served with notice of all proceedings in the cause, and to appear thereon. But the costs occasioned thereby shall be paid by the party entering such appearance, unless the court shall otherwise direct.

28.

That a party shall not be at liberty to enter such special appearance under the twenty-seventh order, after the time limited by the practice of the court for appearing to a bill in the ordinary course, without first obtaining an order of the court for that purpose, such order to be obtained on notice to the plaintiff; and the party so entering such special appearance shall be bound by all the proceedings in the cause, prior to such special appearance being so entered.

29.

That where no account, payment, conveyance, or other relief is sought against a party, but the plaintiff shall require such party to appear to and answer the bill, the costs occasioned by the plaintiff having required such party so to appear and answer the bill, and the costs of all proceedings consequential thereon, shall be paid by the plaintiff, unless the court shall otherwise direct.

30.

That in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

31,

That in suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

32.

That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

33.

That where a demurrer or plea to the whole bill shall be overruled, the plaintiff, if he does not require an answer, shall be at liberty immediately to file his note in manner directed by the twenty-first order, and with the same effect, unless the court shall, upon over-

ruling such demurrer or plea, give time to the defendant to plead, answer, or demur; and in such case, if the defendant shall file no plea, answer, or demurrer, within the time so allowed by the court, the plaintiff, if he does not require an answer, shall, on the expiration of such time, be at liberty to file such note.

34.

That where the defendant shall file a demurrer to the whole bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within twelve days from the expiration of the time allowed to the defendant for filing such demurrer, cause the same to be set down for argument; and where the demurrer is to part of the bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such last-mentioned demurrer, cause the same to be set down for argument.

35.

That where the defendant shall file a plea to the whole or part of a bill, the plea shall be held good to the same extent and for the same purpose as a plea allowed upon argument, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such plea, cause the same to be set down for argument, and the plaintiff shall be held to have submitted thereto.

36.

That no demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

37.

That no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

38.

That a defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and that he

shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

39.

That where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the registrar's book, in the form or to the effect following; that is to say, "Set down upon the defendant's objection for want of parties;" and that where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

40.

That if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

41.

That where a defendant in equity files a cross-bill against the plaintiff in equity for discovery only, the costs of such bill, and of the answer thereto, shall be in the discretion of the court at the hearing of the original cause.

42.

That where a defendant in equity files a cross-bill for discovery only against the plaintiff in equity, the answer to such cross-bill may be read and used by the party filing such cross-bill, in the same manner and under the same restrictions as the answer to a bill praying relief may now be read and used.

43.

That in cases in which any exhibit may by the present practice of the court be proved *viva voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *viva voce* at the hearing.

44.

That where a defendant makes default at the hearing of a cause, the decree shall be absolute in the first instance, without giving the defendant a day to show cause, and such decree shall have the same force and effect as if the same had been a decree *nisi* in the first instance, and afterwards made absolute in default of cause shown by the defendant.

45.

That every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to inquire and state to the court what parts (if any) of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

46.

That a creditor, whose debt does not carry interest, who shall come in and establish the same before the master, under a decree or order in a suit, shall be entitled to interest upon his debt, at the rate of £4 per cent. from the date of the decree, out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest.

47.

That a creditor who has come in and established his debt before the master under a decree or order in a suit, shall be entitled to the costs of so establishing his debt, and the same shall be taxed by the master, and added to the debt.

48.

That in the reports made by the masters of the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform

the court what state of facts, charge, affidavit, deposition, examination or answer were so brought in or used.

49.

That it shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it.

50.

That in any petition of rehearing of any decree or order made by any judge of the court, it shall not be necessary to state the proceedings anterior to the decree or order appealed from, or sought to be reheard.

51.

That the foregoing orders shall take effect as to all suits, whether now depending or hereafter commenced, on the last day of Michaelmas term, one thousand eight hundred and forty-one.

Eq. Prac. Vol. III.—III.

FORMS.

| | PAGE |
|--|-------------|
| Form No. 1. Bill to Enjoin Infringement of Patent..... | 1764 |
| Form No. 2. Bill to Enjoin Infringement of Copyright..... | 1766 |
| Form No. 3. Another Bill in Copyright Case | 1773 |
| Form No. 4. Bill to Enjoin Infringement of Trade-Mark | 1778 |
| Form No. 5. Bill for Partnership Accounting and for Receiver..... | 1781 |
| Form No. 6. Cross Bill for Foreclosure | 1782 |
| Form No. 7. Bill to Carry Decree into Execution | 1784 |
| Form No. 8. Praeclipe for Subpoena ad Respondendum | 1785 |
| Form No. 9. Subpoena ad Respondendum | 1785 |
| Form No. 10. Praeclipe for Appearance | 1786 |
| Form No. 11. Exceptions to Bill for Scandal or Impertinence..... | 1786 |
| Form No. 12. Affidavit and Certificate to Demurrer | 1787 |
| Form No. 13. Demurrer for Multifariousness | 1787 |
| Form No. 14. Another Demurrer for Multifariousness | 1788 |
| Form No. 15. Demurrer for Plaintiff's Want of Interest in Subject-Matter | 1788 |
| Form No. 16. Demurrer for Defendant's Want of Interest in Subject-Matter | 1789 |
| Form No. 17. Demurrer Specifying Several Grounds | 1789 |
| Form No. 18. Another Demurrer Specifying Several Grounds | 1790 |
| Form No. 19. Plea in Abatement on Ground of Another Suit Pending.... | 1791 |
| Form No. 20. Plea to Bill to Carry Decree into Execution..... | 1794 |
| Form No. 21. Disclaimer | 1794 |
| Form No. 22. Answer Denying Infringement of Copyright | 1796 |
| Form No. 23. Replication | 1799 |
| Form No. 24. Order Sustaining Demurrer | 1800 |
| Form No. 25. Order Sustaining Demurrer and Dismissing Bill..... | 1800 |
| Form No. 26. Order Overruling Demurrer | 1801 |
| Form No. 27. Restraining Order Enjoining Laborers and Labor Organiza- tions | 1801 |
| Form No. 28. Affidavit for Preliminary Injunction in Copyright Case.... | 1802 |
| Form No. 29. Injunction Bond | 1804 |
| Form No. 30. Order for Preliminary Injunction | 1805 |
| Form No. 31. Order for Preliminary Injunction against Picketing, etc.... | 1805 |
| Form No. 32. Order for Preliminary Injunction and Appointment of Receiver | 1806 |
| Form No. 33. Master's Report of Foreclosure Sale | 1808 |
| Form No. 34. Rule to Show Cause against Confirmation of Fore- closure Sale | 1909 |
| Form No. 35. Notice of Rule to Show Cause against Confirmation of Fore- closure Sale | 1810 |

| | PAGE |
|---|------|
| Form No. 36. Exceptions to Master's Report of Foreclosure Sale | 1810 |
| Form No. 37. Order and Decree Confirming Report of Foreclosure Sale.... | 1811 |
| Form No. 38. Another Decree Confirming Foreclosure Sale | 1812 |
| Form No. 39. Another Decree Confirming Foreclosure Sale | 1813 |
| Form No. 40. Decree Distributing Balance after Foreclosure Sale..... | 1814 |
| Form No. 41. Consent Decree | 1816 |
| Form No. 42. Decree for Injunction and Accounting in Patent Case..... | 1817 |
| Form No. 43. Decree for Permanent Injunction in Copyright Case..... | 1818 |
| Form No. 44. Decree for Permanent Injunction against Interference with Interstate Commerce | 1820 |
| Form No. 45. Writ of Injunction in Copyright Case | 1821 |
| Form No. 46. Writ of Assistance | 1823 |

FORM NO. 1.

BILL TO ENJOIN INFRINGEMENT OF PATENT.

In the United States Circuit Court,
 in and for the }
 Southern District of New York. } In Equity.

To the Honorable the Judges of the Circuit Court of the United States in and
 for the Southern District of New York, in Chancery Sitting:

John Doe, residing in the city of New York, in the state of New York, and
 a citizen of the state of New York, brings this his bill of complaint against
 Richard Roe, of the city of New York, in the state of New York, and a citizen
 of said state of New York and inhabitant of said southern district of New York.

And thereupon your orator complains and says that before the tenth day of
 May, eighteen hundred and ninety-eight, John Doe, of the city of New York, was
 the true, original, and first inventor of a certain new and useful improvement
 in pipes, not known or used by others before his said invention thereof, and
 which had not at the time of his application for a patent therefor been in public
 use or on sale with his consent or allowance for a period of more than two
 years, as your orator verily believes.

And your orator further shows unto your honors, that John Doe, so being
 the inventor of said improvement, made application to the proper department
 of the government of the United States for letters patent therefor, in accordance
 with the then existing laws of the United States, and he having duly complied,
 in all respects, with the conditions and requisitions of said laws, such proceed-
 ings were had, that on the tenth day of October, eighteen hundred and ninety-
 eight, letters patent of the United States for the said improvement and invention,
 under the seal of the patent-office of the United States, signed by the secretary
 of the interior, and countersigned by the commissioner of patents, and bearing
 date the day and year last aforesaid, were issued in due form of law, and
 delivered to said John Doe, whereby was granted and secured to him and his
 heirs or assigns, for the term of seventeen years from the day of the date thereof,
 the full and exclusive right of making, using, and vending to others to be used,

the said improvement and invention, a description whereof is given in the words of the said inventor in a schedule in writing, accompanied by drawings and references thereto, duly annexed to said letters patent, when the same were issued, and made a part thereof, as by the said original letters patent, or a duly authenticated copy thereof, in court to be produced, will fully appear; a copy of which, without the drawings, is hereto annexed, forming part of this bill, and marked Exhibit A.

And your orator further shows unto your honors, that the said improvements patented as aforesaid have hitherto been in the exclusive possession of said John Doe; that they have been by him introduced into practical use, and have proved to be valuable to the public, and have been, and still are, of great value to your orator; that your orator has expended large sums of money in developing and introducing into use pipes containing the said improvements, and he engaged in the business of manufacturing and selling such pipes, and that but for the infringement herein complained of your orator would now be in undisturbed possession and enjoyment of the exclusive rights and privileges secured by said patent.

And your orator further shows unto your honors, that the several improvements patented, and claimed in and by said last mentioned letters patent, and by the several claims thereof, pertain to the same subject-matter, and are adapted to be used together, and are capable of being embodied and used together in a single pipe, and are so embodied and used by the defendant.

And your orator further shows that the said defendant, as your orator is informed and believes, well knowing the premises, without any right or authority, and in violation of your orator's said rights, has within the said southern district of New York and since the issue and during the term of said letters patent made, or caused to be made for use, and has vended to others to be used, a large number of pipes, but how many your orator cannot state, but prays that the defendant may discover and set forth the number of the same which contain substantially the improvements so patented, as aforesaid, by said last mentioned letters patent, and said defendant persists in making and selling said patented improvements, though warned to desist, and is now making, or causing to be made, for sale and use, and is now selling to be used, and threatens and gives out that he will continue to make, and vend to be used, pipes containing said patented improvements, or some material part thereof; and your orator fears that the defendant will in future infringe upon the exclusive rights secured to your orator as aforesaid; whereby great gains and profits have accrued, and will accrue, to the defendant which in equity belong to your orator. And your orator has sustained damages by reason of said violation of his rights, and will sustain further damages if said infringement is continued.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein prayed, and may, and according to the best of his knowledge, remembrance, information and belief, but not on oath, answer on oath being expressly waived, full, true, direct and perfect answer make to all and singular the premises, and that he may be decreed to account for, and pay over to your orator all gains and profits realized by him from the unlawful making, using or vending the improvements vested in your orator as aforesaid; and in addition thereto, the damages sustained by your orator by reason of such infringement, to be assessed by or under the direction of your honors; and that your honors may increase the actual damages to three times

the amount of such assessment under the circumstances of the wilful and unjust infringement by said defendant, and that the defendant may be perpetually restrained by an injunction out of this honorable court, from making, using or vending pipes containing the improvement secured as aforesaid to your orator or any material part thereof; and that your orator may have such other or further relief as equity may require.

May it please your honors to grant your orator not only a writ of injunction, conformable to the prayer of this bill, but also a writ of subpoena, directed to the defendant Richard Roe and commanding him at a certain time, under a certain penalty, to appear before your honors, in this court, then and there to answer unto this bill of complaint, and to abide by and perform such decree as the court may make in the premises.

JOHN DOE.

**LONG & MOORE, Solicitors for Complainant.
JEREMIAH MASON, of Counsel.**

United States of America, }
Southern District of New York. { ss.

John Doe, the complainant in the foregoing bill named, being duly sworn, says that he has read the foregoing bill and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

And he further says that he verily believes that John Doe in said bill named is the original, true and first inventor of the new and useful improvement in pipes which is described and claimed in the aforesaid letters patent granted to said John Doe mentioned in the foregoing bill.

And deponent further says that he verily believes that the complainant is the owner of said letters patent as set forth in said bill.

JOHN DOE

Subscribed and sworn to before me
this tenth day of December, A. D. 1898.

NOBTON PORTER Notary Public.

FORM NO. 23

BILL TO ENJOIN INFRINGEMENT OF COPYRIGHT

Circuit Court of the United States, Northern District of New York, in the
Second Circuit.

**The West Publishing Company
against
The Lawyers' Co-operative Publishing Com-
pany.**

To the Judges of the Circuit Court of the United States for the Northern District
of New York, in the Second Circuit:

The West Publishing Company, a corporation duly organized under the laws of the state of Minnesota, having its principal office and place of business at the

¹ Copied from the record in West Pub. Co. v. Lawyers' Co-operative Pub. Co., 79 Fed. Rep. 756. For other pleadings in the same case, see Forms Nos. 22, 23, *infra*, pp. 1796, 1799.

city of St. Paul, and a resident or citizen of the state of Minnesota, brings this its bill against the Lawyers' Co-operative Publishing Company, a corporation duly organized under the laws of the state of New York, having its principal office and place of business at the city of Rochester, in the northern district of New York, and a resident or citizen of said state of New York.

And thereupon your orator complains and says,² that the defendant, the Lawyers' Co-operative Publishing Company, is and for nine years last past has been a corporation duly organized, created and established by and under the laws of the state of New York for the purpose of carrying on the business of making, editing, preparing, publishing and selling books, and that during that time it has carried on and still carries on said business at the city of Rochester, in the state of New York; that your orator is and for ten years last past has been a corporation duly organized, created and established by and under the laws of the state of Minnesota for the same purpose, and that during that time it has carried on and still carries on said business at the city of St. Paul in said state of Minnesota, where it has its principal office and place of business, and that the principal office and place of business of the defendant is located at the city of Rochester in the northern district of the state of New York, and that the defendant as well as your orator is and both of them are residents or citizens of the United States.

And your orator further alleges and shows that since the fifteenth day of September, 1891, it has from time to time, made, edited, prepared and published and thereupon became and was the author and proprietor of a book or work, which had not then been published, entitled, "The Federal Reporter, Vol. 47. Cases Argued and Determined in the Circuit Courts of Appeals and Circuit and District Courts of the United States. Permanent Edition. September-December, 1891," and generally known and labeled on the back as the Federal Reporter, Vol. 47, and, as such author and proprietor, your orator, desiring to secure a copyright upon the same in accordance with the statute of the United States in such case made and provided, before the publication of said book, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book, and in accordance with the law, on the twentieth day of February, 1892, not later than the day of publication thereof, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, two copies of such copyright book; and that such copyright book was printed from plates made from type set within the limits of the United States. And your orator further alleges and shows that from the fifteenth day of September, 1891, until the completion and publication of said book, your orator from time to time made, edited, prepared and published and thereupon became and was the author and proprietor of certain advance sheets or pamphlet books or numbers, containing the decisions of the cases argued and determined in the Circuit Courts of Appeals and Circuit and District Courts of the United States, from September, 1891, to December, 1891, as they were handed down by said courts, which advance sheets or pamphlet books were and are parts of said Federal Reporter, Vol. 47, and are substantially identical with said volume, but were issued from time to time in pamphlet form or numbers for greater convenience and speed in pro-

² Form of address and introduction as above, see Equity Rule 20, *supra*, p. 1670.

mulgating said decisions and were entitled, respectively: "Federal Reporter, Vol. 47, September 22, 1891, No. 1;" (Here followed a similar description of twelve other parts.)

And your orator further alleges and shows that your orator, desiring to secure a copyright upon the first advance book or number so contained in the completed and permanent edition, published prior to the completion of the entire volume and entitled "Federal Reporter, Vol. 47, September 22, 1891, No. 1," in accordance with the statute of the United States in such case made and provided, before the publication of said book or advance number, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book or advance number, and not later than and upon the day of publication of said book or advance number, deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, two copies of said copyright book or advance number, printed from plates made from type set within the limits of the United States. And your orator further alleges and shows that your orator, desiring to secure a copyright upon each of the said remaining or following advanced numbers or books, so published from time to time prior to the completion and publication of the entire volume, in accordance with the statute of the United States in such case made and provided, before the publication of each other or remaining book or advance number, respectively, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book or advance number, so that the title of each advance book or number was so deposited before the publication of its respective book or number; and respectively not later than and upon the respective and several days of publication of said book or numbers, viz.: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of said advanced books or numbers, duly deposited in the mails within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, two copies of said copyright book or advanced numbers, so that not later than the day of publication of each of said books or advance numbers two copies of each thereof were so deposited, each and every of the same having been printed from plates made from type set within the limits of the United States. . . .

And your orator further alleges and shows that since the first day of September, 1891, it has from time to time made, edited, prepared and published and thereupon became and was the author and proprietor of a book or work, which had not then been published, entitled (Here was set out a copy of the title-page), generally known and labeled on the back as "American Digest, 1892, Annual;" and as such author and proprietor your orator, desiring to secure a copyright upon the same, in accordance with the statute of the United States in such case made and provided, before the publication of said book, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book; and, in accordance with the law, on the second day of November, 1892, not later than the day of publication thereof, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, Dis-

trict of Columbia, two copies of such copyright book, and that such copyright book was printed from plates made from type set within the limits of the United States.

And your orator further alleges and shows that since August, 1891, it has, from time to time, made, edited, prepared and published and thereupon became and was the author and proprietor of a pamphlet, book or work, which had not then been published, entitled "The American Digest, United States Digest, Third Series (Monthly Advance Sheets), No. 57, September, 1891," and generally known as and called The American Digest Monthly, September, 1891; and as such author and proprietor your orator, desiring to secure a copyright upon the same in accordance with the statute of the United States in such case made and provided, before the publication of said pamphlet book, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said pamphlet book, and, in accordance with the law, not later than the day of publication thereof, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, two copies of such copyright pamphlet book, and that such copyright pamphlet book was printed from plates made from type set within the limits of the United States. (Here follow similar allegations as to the monthly advance sheets Nos. 58 to 68 inclusive.)

And your orator further alleges and shows that each and all of said permanent or complete volumes of reports, as well as each and all of said advance numbers or books, embodied in said several volumes, were prepared, arranged and reported by and under the direction of your orator, and each of said volumes and advance numbers or books contained and contains a large amount of matter original with your orator, all of which was and is the private property of your orator as the author and proprietor thereof, and your orator applied for, and as such author and proprietor obtained, the copyrights thereon as aforesaid.

And your orator further alleges and shows that each and every one of said volumes of reports, as well as each and every of said advance numbers or books, embodied in said several volumes, were prepared and reported, as aforesaid, with great labor and expense, in many instances, from the original cases or error-books, containing the processes, pleadings, proceedings, evidence, objectings, rulings, decisions and exceptions, and from the original points or arguments of counsel, and in all cases from the opinions of the courts or judges delivering judgment, copies of which were obtained, at great expense, by your orator, immediately upon their being handed down. That each of said volumes, as well as each of said advance numbers or books embodied therein, contains a great number of the opinions and decisions of the said courts of judicature, and among other additional original matter your orator prepared for each case and decision so reported a syllabus or head-notes, containing a brief statement of the facts and points of law decided thereon, and also, in many of the cases, preliminary statements of the facts on which the decisions were made. That said syllabi or head-notes and preliminary statements of facts were, except where prepared by the court and so designated, wholly original with your orator, and were made, edited, and published, as aforesaid, in said advance numbers as speedily as possible, and in most instances prior to any other publication or report of said cases within the United States. That the syllabi or head-notes to all the cases reported in each permanent or completed volume were also, by your orator, alphabetically arranged according to the subject matter and

reprinted as an index at the end of such volume, with the names of the parties to the cases to which they belonged and a reference to the page where they would be found, thus making for each volume a full and complete digest of the points decided and the cases reported therein, and making said volumes or works convenient and of great value to all persons desiring to use the same.

And your orator further alleges and shows that the American Digest Monthly of your orator was principally composed of and compiled from the syllabi or head-notes made by your orator of the decisions of causes reported in its said reports taken from the advance numbers of books thereof from time to time as prepared, and collected and arranged under their proper subjects and headings, to which they referred in digest form. And that syllabi or head-notes, made, edited and prepared by your orator for its said system of reports and advance numbers, were made, edited and prepared also with a special reference to their fitness and adaptability for use as digest paragraphs in the index digest to each complete volume of reports, and in the monthly or advance digest sheets or pamphlets, and also in the American Annual Digest, or permanent digest for the year. And that the Annual Digest of your orator for 1892 was principally compiled from and composed of the syllabi or head-notes of the cases originally made, edited and prepared for and published in the advance numbers of its permanent editions of its reporters, and which were from time to time reprinted in digest form in the advance numbers or monthly parts of the Digest, from which, and from the advance sheets of the reporters, they were afterward collected and rearranged in permanent form under their appropriate subjects and headings in the Annual Digest as aforesaid.

And your orator further alleges and shows that, by the original work of your orator, and in particular by the original syllabi or head-notes, said volumes of reports and said American Annual Digest, as well as the advanced numbers or books, and said Monthly Digest, became and were convenient and were of great value to all persons desiring to use the same. And your orator further alleges and shows that it has, from time to time, printed and sold a large number of said volumes and the said respective advance numbers or books to its customers and subscribers, amounting to several thousand of each of said volumes, with the advance numbers or books, and also of the American Digest, with its monthly advance numbers or books, and has caused to be printed and inserted in each and all of said copies or volumes, as well in the permanent and complete books or editions as in each and every advance number and book, on the back of the title-page of each and all the complete and permanent volumes or books, and on the title-page of each and all the advance numbers or books, the information and notice of such copyright as required by law; that your orator has never sold or transferred any of said copyrights of said books or works or advance numbers or books, nor any interest or share in the same or in either of them, nor authorized the defendant to publish any of said volumes of reports or any portion thereof, or extracts, excerpts or abridgements thereof; but your orator was and is the sole and exclusive owner of the stock, and the proprietor of all of the said copyrights, and has the sole and exclusive right to publish each and all of the said syllabi and head-notes and preliminary statement of facts contained in said volumes and advance numbers or books, and reprinted in said Annual and Monthly Digests as aforesaid; that your orator had and has the exclusive right to all the contents contained in each and all of said books, volumes or works, and in all of said advance numbers or books, such as the head-notes, head-lines or catch-words, preliminary statements of facts, abstracts of points or arguments of counsel, the

arrangement and division of the cases into volumes, the notes of authorities added to any of the cases as reported, the indices or index-digests in and for each completed or permanent volume of reports, and of all other matter excepting merely the opinions or decisions of the said courts; and the said copyright of the said completed or permanent volumes, together with the said respective advance numbers or books thereof, as well as the said Annual and Monthly Digests, are of great value, to wit, of the value of three hundred thousand dollars, and the loss and damage to your orator by reason of the violations thereof is not less than the same amount.

Nevertheless, as your orator further alleges and shows, the defendant, in its business of publishing and selling law-books, reports and digests, has for several years past and now does publish and sell a volume, annually, known as and called the General Digest, of which it publishes and issues advance sheets and numbers semi-monthly, which said digest and advance numbers is published and sold in competition with the said copyright books and advance numbers or books of your orator, including its Annual and Monthly Digests. That the said defendant, well knowing that the syllabi or head-notes of your orator were made, edited and prepared by your orator with special reference to their adaptability and fitness for use as digest items, and that your orator had been so using and intended so to use the said syllabi or head-notes, did, at different times during the latter portion of the year 1891, and the year 1892, without the consent of your orator, reprint, publish and sell at the cities of Rochester, New York, and elsewhere in the state of New York, and in the said northern district of New York, and all over the United States, and did continuously since and still does publish and expose to sale and sell in large numbers, advance numbers of their General Digest, containing statements of facts, syllabi and headnotes taken, copied and pirated from the said several advance numbers or books thereof of your orator, as well as from the said Annual and Monthly Digests.

And your orator further alleges and shows, on information and belief, that the defendant, in preparing its General Digest for the year 1892, has used and employed principally, as matter therefor, the head-notes or points issued and published in its advance numbers from time to time, which head-notes or points are largely and to a great extent copies of and piracies upon the copyright syllabi, head-notes or points of your orator, made, prepared and edited by your orator and published in its volumes and advance numbers of books, as aforesaid. And your orator further alleges and shows that the defendant has advertised, for some time since, the publication of its General Digest for 1892, and now threatens to and as your orator is informed and verily believes is about to issue, publish and sell the same, so containing infringements upon copies of and piracies of the original copyright matter of your orator, as aforesaid, to the great injury and irreparable damage of your orator in its business, and for which it cannot be compensated by damages in an action at law. That in preparing said General Digest for publication and in preparing the advance numbers thereof, the defendant has substantially copied the head-notes and syllabi, as previously prepared and published by your orator, as aforesaid, resorting to the devices, common in this sort of piracy, of transposing clauses, sentences and paragraphs, using synonyms and making colorable alterations, while always repeating the substance, often using the exact words, and frequently even entire sentences and entire head-notes verbatim from said original works of your orator, and in many instances omitting to correct even the inaccuracies and errors therein, and also in availing

itself of the original work, method and ideas of your orator in making and preparing your orator's head-notes and in digesting the cases, without following the exact language used by your orator, so that thereby, to the great damage of your orator, the defendant was and is enabled to prepare, publish and sell its pirated publications with greater ease and accuracy, and at far less expense; all of which infringements, colorable alterations, copying, piracies and transpositions, will more fully appear upon an examination and comparison of said General Digest and advance numbers thereof with said volumes and advance numbers or books of your orator, which your orator is ready to produce as this honorable court may direct. That the said General Digest, so about to be published, and the advance numbers thereof of the defendant are infringements of and piracies upon the copyrights of your orator, and the said books were made and intended by the defendant to take the place of and as far as possible supersede the said books and advance numbers of your orator, and especially the said Annual and Monthly Digests of your orator, and by means of the various arts and devices aforesaid the defendant has been and is selling large numbers of its said advance sheets of numbers of its Digest to persons who would otherwise have bought or would now buy the said volumes and advance numbers of your orator, and especially its Annual and Monthly Digests for 1892, to its great loss and damage; and the defendant, by means of the art and devices aforesaid, unless restrained by this honorable court, will sell large numbers of their said General Digest for 1892 to persons who would otherwise buy the said Annual Digest of your orator, to its great loss and damage; all of which acts and doings of the defendant are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

In consideration whereof and forasmuch as your orator is without adequate remedy, save in a court of equity, your orator prays this honorable court to issue its writ of subpoena, in due form of law and according to the course and practice of the court, directed to the said Lawyers' Co-operative Publishing Company, the defendant, as aforesaid, commanding it at a certain day and under a certain penalty to be therein specified to appear before this honorable court to answer all and singular the matters and things hereinbefore set forth and complained of, and especially to answer and set forth:

1. The date of the publication of each of the said advance numbers of said General Digest, issued since August, 1891, by the defendant.
2. The number of copies published of each said advance number.
3. The number of subscribers to said General Digest for the year 1892, and how many said advance numbers of said Digest have been sold and the prices at which they were severally sold.
4. How many orders for said General Digest have been received by the defendant, and at what price per volume.
5. How many of each of said advance numbers of said Digest are still in the possession and under the control of the defendant.
6. How many volumes of said complete General Digest have been made or prepared for publication and sale, or are now being made or prepared therefor or are now in the possession or under the control of the defendant. And to answer all the other matters herein complained of as specifically as if thereto specifically interrogated.

But the said answers to the foregoing interrogatories and to this bill of complaint need not be under oath, an answer under oath being hereby expressly waived.

And your orator prays that the defendant may be restrained by injunction from publishing, selling or exposing for sale, or causing or being in any way concerned in the publishing, selling or exposing for sale, said General Digest for 1892, now threatened to be issued, published and sold by the defendant, or otherwise disposing thereof, and from publishing, selling or exposing for sale, or causing or being in any way concerned in the publishing, selling or exposing for sale, or otherwise disposing of any of said advance numbers of said Digest or copies thereof, hereinbefore complained of, and that all of said books published, as aforesaid, or so about to be published, issued or sold by the defendant, and the stereotype plates thereof be declared forfeited to and for the benefit of your orator, and that the defendant be required to surrender and deliver the same to your orator, and be decreed to render an account of all of said books or numbers published of about to be, and of all that have been sold, and to pay the same, besides the damages suffered from such unlawful publications and the costs of this suit to your orator, and that your orator may have such other and further relief as the nature and circumstances of the case may require and as to this court shall seem just and equitable.

PIERRE E. DU BOIS,
Solicitor for Complainant.
E. COUNTRYMAN,
Of Counsel.

United States of America, } ss.:
District of Minnesota.

Peyton Boyle, being duly sworn, says that he is the vice-president of the corporation complainant above named, and is familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

PEYTON BOYLE.

Subscribed and sworn to before me this twentieth day of December, 1892.
AMBROSE TIGHE,
U. S. Commissioner, District of Minnesota.

FORM NO. 3.*

ANOTHER BILL IN COPYRIGHT CASE.

Circuit Court of the United States for the Southern District of New York.
In Equity.
To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York, sitting as a Court of Equity:
James T. Black, Francis Black, Adam W. Black and Alexander B. McGlashen, all of the city of Edinburgh, Scotland, and all of whom are subjects of Her

* Copied from the record in *Black v. Henry G. Allen Co.* 42 Fed. Rep. 618. For other pleadings and proceedings in the same case, see Forms Nos. 12, 43, 45, *infra*, pp. 1787, 1815, 1821.

Majesty the Queen of Great Britain and Ireland, and all of whom are aliens, and who are copartners, engaged in business as publishers at the city of Edinburgh under the firm name of Adam & Charles Black, and Francis A. Walker, of the city of Boston, in the county of Suffolk, and state of Massachusetts, and a citizen of said state, and now, and at the time of, and at all times since, the taking of the copyright hereinafter mentioned, a citizen of the United States, bring this their bill of complaint against the Henry G. Allen Company, a corporation organized and existing under and by virtue of the laws of the state of New York, and having its principal place of business at the city of New York, in said state of New York.

And thereupon your orators complain and say as follows, to wit:

The said firm of Adam & Charles Black, your orators aforesaid, are the publishers of a certain work entitled "The Encyclopaedia Britannica, Ninth Edition." The said firm of Adam & Charles Black, at the time of the making of the agreement hereinafter mentioned, consisted of your orators James T. Black, Francis Black and Adam W. Black; and your orator Alexander B. McGlashen became a partner at a later date; and the present firm of Adam & Charles Black now hold and enjoy all the rights of their predecessors in respect of the said "Encyclopaedia Britannica" and the said agreement and the copyright hereinafter mentioned, all the said rights of their predecessors having been vested in them according to law.

Your orators show that the said "Encyclopaedia Britannica" is a well known work, of standard value and character, eight editions of which had been published, and the ninth edition of which was undertaken and has been completed, printed and published at great expense by said Adam & Charles Black. The said ninth edition of the "Encyclopaedia Britannica," so printed and published, is made up of articles or books, each of which is, in a large number of instances, a complete and independent book. None of the articles or books contained in the twenty-third volume of said "Encyclopaedia Britannica," hereinafter referred to, with the exception of the copyrighted book hereinafter referred to, entitled "United States, Part III, Political Geography and Statistics," and two other books or articles, have been copyrighted in the United States.

And your orators further say that heretofore, and before the thirteenth day of February, 1888, your orator, said Francis A. Walker, was then a citizen of the United States and a resident of the city of Boston, in the county of Suffolk, and state of Massachusetts, [and] was the author of a certain book entitled "United States, Part III, Political Geography and Statistics," the copyright of which book was by him, the said Walker, duly secured according to the provisions of the statute of the United States relating to copyrights; that is to say, the said Walker, being the author of the said book entitled "United States, Part III, Political Geography and Statistics," and a citizen of the United States and resident therein, did print and publish the same and did, before the publication thereof, deposit in the mail addressed to the librarian of Congress, Washington, District of Columbia, a printed copy of the title of said work, and did, on the thirteenth day of February, A. D. 1888, deliver at the office of the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book, and did also, within ten days from the publication of said book, which publication was by him, the said Walker, made in the United States, deposit in the mail addressed to the librarian of Congress at Washington, District of Columbia, and did deliver at the office of the librarian

of Congress at Washington, District of Columbia, two copies of said book, each of which copies so deposited in the mail was a complete printed copy of said book of the best edition issued, and also give notice and information of the copyright thereof having been by him secured by inserting in the several copies of every edition published, on the title-page thereof, the following words, to wit: "Copyright 1888, by Francis A. Walker." And the said Walker duly complied with and fulfilled all the other requirements and provisions of the statutes in such case made and provided, and the librarian of Congress did, on the thirteenth day of February, 1888, record the name of the said book entitled as aforesaid, "United States, Part III, Political Geography and Statistics," and there was granted to the said Walker a copyright for the term of twenty-eight years from the thirteenth day of February, 1888, and the said Walker became entitled to and did acquire the sole liberty of printing, reprinting, publishing, completing, copying, executing and vending the said copyrighted book for the said term of twenty-eight years from the thirteenth day of February, 1888, which copyright still continues and remains in full force and effect.

And your orators further say that your orator, the said Francis A. Walker, having obtained the said copyright in pursuance of law, did, by an agreement made on or about the first day of April, 1888, and before the infringement hereinafter complained of, for a good and valuable consideration, assign and transfer to your orators constituting the firm of Adam & Charles Black an interest in said copyright: that is to say, the said Walker did assign and transfer to your orators constituting the firm of Adam & Charles Black the sole and exclusive right and liberty of printing, reprinting, publishing, copying and vending during the whole term of the said copyright, the said book entitled "United States, Part III, Political Geography and Statistics," in connection with and as a part of their said Encyclopaedia designated "Encyclopaedia Britannica, Ninth Edition," and not otherwise, the said Walker retaining the right to print, publish, copy and vend the said copyrighted book in every form and manner, other than as a part of said "Encyclopaedia Britannica."

And your orators say, that if the said Francis A. Walker did not by the said agreement made on or about the first day of April, 1888, assign and transfer to your orators constituting the firm of Adam & Charles Black, an interest in said copyright, the said agreement was an exclusive and irrevocable license to your orators constituting the firm of Adam & Charles Black, giving and granting them, and by which they acquired, the sole and exclusive right and liberty of printing, reprinting, publishing, copying and vending, during the whole term of said copyright, the said book entitled "United States, Part III, Political Geography and Statistics," in connection with, and as a part of, their said twenty-third volume of their said "Encyclopaedia Britannica, Ninth Edition." And your orators aver that your orators constituting the firm of Adam & Charles Black acquired by the said agreement an equitable interest in said copyright which is substantially the same whether the said agreement was and should be held to be an assignment and transfer of an interest in said copyright or an exclusive license to use the subject of the said copyright as part of said volume of said Encyclopaedia.

And your orators aver that your orators who constitute the firm of Adam & Charles Black have now, and have had since the making of said agreement, an equitable interest in said copyright, and have had the exclusive right of printing, publishing and vending said copyrighted book as part of their said Encyclopaedia,

and that they, your orators who constitute said firm, are greatly and directly injured by the infringements hereinafter complained of, and are equitably entitled to receive the profits which have been diverted from them by the acts of the said The Henry G. Allen Company, hereinafter set forth and complained of, and an account of which is hereinafter prayed for.

And your orators constituting the firm of Adam & Charles Black, after the said copyright had been taken by said Walker, exercised their rights in the premises and made use of said copyrighted book, and printed and sold the same in connection with, and as part of, their twenty-third volume of their said Ninth Edition of the "Encyclopaedia Britannica," and continue so to use said copyrighted book; and the right so to use the same is of great value and importance to them.

And your orators say that the whole of said copyright and all the privileges of every nature and description relating thereto, with the exception of the right to use the subject thereof in said Encyclopaedia, has always remained and continued to be the property of said Walker. And your orators aver that they are now well seized of said copyright, and are the owners thereof, and that the same is of great value and importance to them, and that they have the right to enjoy all the privileges secured and intended to be secured thereby; and that they now have, and have always had, since said copyright was obtained, copies of said copyrighted book exposed for sale, and that the public have been supplied with the same to their benefit and advantage and the profit of your orators.

And your orators further say that the said The Henry G. Allen Company, intending to injure your orators, and contriving to deprive them of the privileges which they were to receive from the sole and exclusive printing, publishing and vending the said book entitled "United States, Part III, Political Geography and Statistics," has unlawfully, and without the consent of your orators, printed, published and sold, or caused to be printed, published and sold, in said southern district of New York, since your orators' rights in the premises were acquired, as aforesaid, and since the recording of the title of said copyrighted book, a large number of copies of said copyrighted book, or a substantial part or parts thereof, which infringing books so printed, published and sold by said company have been in every way substantially the same as the book which is the subject of your orators' charge, were copied and pirated from your orators' copyrighted book, and the reprinting, publishing and sale of which by said company was a piracy and infringement of your orators' said copyright, and of their rights, and the rights of each and all of them, growing out of said copyright.

And your orators say that the said piratical books so printed in violation of your orators' rights, the said The Henry G. Allen Company has caused to be used in connection with and as part of a so-called "reprint" of the said Encyclopaedia Britannica, Ninth Edition, of your orators who constitute the firm of Adam & Charles Black, the same having been printed and used in every way as said copyrighted book had been printed and used by your orators constituting the firm of Adam & Charles Black, in pursuance of their rights in the premises, and as hereinbefore set forth; except that the said The Henry G. Allen Company has omitted the marginal notes of the original and the copyright notice applied upon the title-page of said copyrighted book, to wit: "Copyright 1888, by Francis A. Walker." All of which matters and things acted and done by the said The Henry G. Allen Company are contrary to equity and good conscience, and a great and continuing injury to your orators and to each and all of them,

And the said company has in its possession or power a large number of copies of said infringing books, and threatens to continue and persist in publishing and selling the same in further violation of your orators' rights as aforesaid, and infringement of their said copyright.

And your orators, all and singular, do hereby expressly waive and relinquish any and every right which they may have by reason of the acts of the said The Henry G. Allen Company, hereinbefore complained of, to enforce against or recover of it, the said The Henry G. Allen Company, its successors and assigns, any penalty or penalties, forfeiture or forfeitures, under or by virtue of the statutes of the United States concerning copyrights.

In consideration whereof, and because your orators are remediless in the premises by the rules of the common law, and cannot have adequate relief, save in a court of equity, where matters of this nature are properly cognizable, and to the end that the said The Henry G. Allen Company may answer, all and singular, the matters and things hereinbefore set forth and complained of, and that the said The Henry G. Allen Company be forever restrained by injunction, as well perpetually as during the pendency of this suit, from printing and from publishing and selling or exposing for sale, or otherwise disposing of any copies of its said piratical and unlawful book; and that it may be ordered to render an account of the profits arising from the sale of said piratical book, as far as any profits have been made, and required to pay over such profits to your orators; the profits resulting from the use of said piratical book as a part of said "reprint" being profits to which your orators constituting the firm of Adam & Charles Black are equitably entitled, and the remaining profits growing out of any other infringement of said copyright, if any there be, being profits which, of right, belong to your orator said Francis A. Walker; and to pay to your orators their costs and disbursements in this suit; and that your orators may have such further relief in the premises as to this honorable court may seem meet and equitable, and as the nature and circumstances of the case may require.

May it please your honors such relief fully to direct and order, the same as if the relief which equity demands were made the subject of a specific prayer or prayers; and may it please your honors to grant unto your orators a writ of subpoena according to the course of courts of equity, directed to the said The Henry G. Allen Company, commanding it personally to be and appear before this honorable court, then and there to answer the premises, and to stand to and abide by such order and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, etc.

FRANCIS A. WALKER.

ROWLAND COX,
Solicitor for Complainants.
ROWLAND COX,
Of Counsel for Complainants.

United States of America, District of Massachusetts,
County of Suffolk,
State of Massachusetts.

Francis A. Walker, being duly sworn, says he is one of the complainants named in the foregoing bill of complaint by him subscribed, that he has read the said bill and knows the contents thereof; that as to the statements contained in said

Eq. Prac. Vol. III.—112,

bill which are within his own knowledge, they are true, and as to the statements derived from the information of others, he verily believes them to be true.

FRANCIS A. WALKER.

Subscribed and sworn to before me this twenty-fifth day of October, A. D. 1889.
(Seal) CHAS. HALL ADAMS,

Commissioner of the State of New York.

Also Notary Public for the County of Suffolk, State of Massachusetts.

FORM NO. 4.⁴

BILL TO ENJOIN INFRINGEMENT OF TRADE-MARK.

[Title of court and cause, address, etc., see Forms Nos. 2, 3, *supra*, pp. 1766, 1773.]

Your orators, John Taylor and William Taylor, of the borough of Leicester, in that part of the kingdom of Great Britain called England; that for many years past they have been extensively engaged in manufacturing sewing cotton thread, at Leicester aforesaid, and vending the same in large quantities, not only in England, but through the United States, and in particular in the city and state of New York. That their thread is, and for many years has been, put up for sale in spools, and labeled on the top of the spool "Taylor's Persian Thread," and on the bottom of the spool "J. & W. Taylor, Leicester;" each spool usually containing two hundred yards or three hundred yards of thread—and the spools containing two hundred yards being black, and labeled "200 yds." on the bottom of the spool—and those containing three hundred yards being red, and labeled "300 yds." on the bottom of the spool—and on the center of the same label, on the bottom of each spool, is stamped the symbol or print of a lion rampant.

Your orators further show unto your honor, that their said thread has been and is manufactured of various sizes and numbers, to meet the wants of the trade; and by means of the care, skill and fidelity with which your orators have conducted the manufacture thereof for a series of years, their said thread has acquired a great reputation with the trade throughout the United States, and large quantities of the same are constantly required from your orators to supply the regular demand for the consumption of the country. And your orators have established agencies for the sale thereof to the wholesale dealers and jobbers in the cities of Boston, New York, Philadelphia and New Orleans; and, in addition thereto, your orators employ Benjamin Warburton, now residing in said city of New York, as their general agent for the United States, in relation to the sale of their said spool sewing cotton thread.

And your orators further show unto your honor, that their said thread is known and distinguished by the trade and the public, as "Taylor's Persian Thread;" and that your orators were the original manufacturers thereof, and the first who introduced the same to the public. That your orators' said general agent, about three weeks since, hearing that complaints were made of the quality

⁴ Copied, except concluding parts, from *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 604.

of "Taylor's Persian Thread," proceeded to investigate the cause of such complaints, and thereupon ascertained that a spurious article of spool sewing cotton thread was offered for sale by sundry jobbers in the said city of New York as and for your orators' "Persian Thread;" and that such complaints had arisen from the fraudulent imposition of such spurious article upon the public.

Your orators further show unto your honor, that their said agent further ascertained upon inquiry, and your orators charge the facts to be, that the said spurious thread so sold, and offered for sale in the said city of New York, was furnished to the said jobbers by one Daniels Carpenter, of Foxborough, in the state of Massachusetts; that the said Daniels Carpenter, disregarding the rights of your orators, and fraudulently designing to procure the custom and trade of persons who are in the habit of vending and using your orator's said "Persian Thread," and to induce them and the public to believe that the said thread was in fact manufactured by your orators, has engaged extensively in the manufacture of sewing cotton thread, and caused the same to be put up for sale in spools similar to those used by your orators—and so colored, stamped, and labeled as to resemble exactly the said spools used by your orators. And the said spool sewing cotton thread, prepared by the said Daniels Carpenter, and sold by him, and in which he is engaged in selling, as aforesaid, is an exact imitation of the same article which your orators had been manufacturing as aforesaid, and selling in the United States, for many years before the said Daniels Carpenter commenced his said fraudulent imitation thereof. And the said spurious article, although inferior in quality to the genuine Persian thread, manufactured by your orators, can only be distinguished therefrom (so exact is the said Daniels Carpenter's imitation, as aforesaid) by a careful examination of its quality, and by its falling short in the number of yards contained on each spool from the number marked thereon as the contents thereof. And that the general appearance of the spurious article is the same as that of your orators' genuine thread, and well calculated to deceive those dealing in the purchase and sale thereof.

Your orators further show unto your honor, that their said general agent has obtained specimens of the said spurious Persian thread, so sold by the said Daniels Carpenter; that in the specimens thus obtained, the thread is put upon black spools, of the same size and appearance with those used by your orators; on the top of which spurious spools there is pasted a round paper label, partly gilt, on which is printed in a circle the words "Taylor's Persian Thread," and in the center of the circle the number of the thread, and on the other end or bottom of such spurious spools, there is pasted a round white paper label on which is printed in a circle the words "J. & W. Taylor, Leicester," and across the label the words "200 yds." and in the center of the label there is impressed the figure or symbol of a lion rampant. And in all these particulars of the labels on each end of the said spurious spools of thread they are exactly like the labels on the respective ends of the spools of your orators' genuine Persian thread, as hereinbefore stated.

Your orators further show unto your honor, that they have not yet ascertained the extent to which the said Daniels Carpenter has carried his said fraudulent imitation of your orators' said thread. But your orators' said general agent has found the same offered for sale to the trade in three wholesale or jobbing houses in the said city of New York, as "Taylor's Persian Thread." From which your orators believe, and they therefore charge on their belief, that

the said Daniels Carpenter has been and is engaged in selling his said fraudulent and spurious imitation of your orators' Persian thread to a large extent, in various places in the United States—and as your orators are informed and believe, the said Daniels Carpenter is expected daily to arrive in the city of New York, to make further sales of his said imitation of your orators' thread.

Your orators further show unto your honor, that the said fraudulent and inequitable conduct of the said Daniels Carpenter is not only injuring them in the sales of their said genuine Persian thread, and the profits which they would otherwise reasonably make therefrom; but by the inferior quality and false measure of the said spurious Persian thread, is greatly prejudicing the reputation of your orators' said Persian thread in the market; and, unless the said imitation is discontinued or prevented, will ultimately destroy the character and standing of the genuine article.

And your orators also charge that the said spurious article is a fraud and deception upon such of the citizens of New York, and of the United States, as purchase the same believing it to be the genuine article manufactured by your orators.

[To the end, therefore, that the said Daniels Carpenter and his confederates may respectively full, true, direct and perfect answers make, upon their respective corporal oaths, according to the best of their respective knowledge, information and belief, to all and singular the matters and charges aforesaid, and that as fully and particularly in every respect as if the same were here again repeated and they thereunto particularly interrogated]; and that the said Daniels Carpenter and his attorney, solicitors, counselors, agents and servants may be enjoined and restrained from manufacturing, selling or offering for sale, directly or indirectly, any spool cotton sewing thread manufactured by him, or any person [other] than your orators, under the denomination of "Taylor's Persian Thread," or on spools with the words "Taylor's Persian Thread," or, "J. & W. Taylor, Leicester," printed, painted, written or stamped, or attached or pasted thereon; or on spools so made, or having any label, printing, or device thereon, in such manner as to be a colorable imitation of your orators' said Persian thread, usually known as "Taylor's Persian Thread." And that the said Daniels Carpenter may be decreed to account to your orators for all the profits which he has made by the sale of his said fraudulent imitation of your orators' thread, and all the profits which your orators would have made on the sales of their genuine thread, but for the said Daniels Carpenter's inequitable and wanton piracy of their said names, spools and labels.

And that your orators may have such further relief, or may have such other relief, as the nature of the case shall require and shall be agreeable to equity.

May it please your honor to grant unto your orator the writ of subpoena issuing out of and under the seal of this honorable court, to be directed to the said Daniels Carpenter, commanding him, by a certain day, and under a certain penalty therein to be inserted, to be and appear before our chancellor, in our court of chancery, and then and there to answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your orator shall ever pray, etc.

JEREMIAH MASON, solicitor for complainants.

OLIVER ELLSWORTH, of counsel for complainants.

[Verification, see Forms Nos. 2, 3, *supra*, pp. 1786, 1773.]

FORM NO. 5.⁵

BILL FOR PARTNERSHIP ACCOUNTING AND FOR RECEIVER.

[Title of court and cause, address, etc., see Form No. 2, *supra*, p. 1766.]

On or about January 1, 1890, your orator and Richard Roe, the defendant hereinafter named, entered into a copartnership together as attorneys and solicitors, your orator engaging to bring into the business the sum of one thousand dollars, and being to receive one-third part or share of the profits, and the said Richard Roe engaging to bring into the business the sum of two thousand dollars, and being to receive two-thirds parts or shares of the said profits.

Your orator further sheweth unto your honors that your orator accordingly brought into the business the said sum of one thousand dollars, and that the said copartnership was carried on and continued until the 1st day of January, 1895, when the same was dissolved by mutual consent, and the usual advertisement of such dissolution was lawfully published.

And your orator further sheweth unto your honors that no settlement of the said copartnership accounts hath ever been made between your orator and the said defendant, and that since the said dissolution your orator hath repeatedly applied to the said defendant to come to a final settlement with respect thereto.

And your orator well hoped that said defendant would have complied with your said orator's reasonable request, as in justice and equity he ought to have done, but the said defendant absolutely refuses so to do.

And your orator charges that the said defendant hath possessed himself of the said copartnership books, and hath refused to permit your orator to inspect the same, and hath also refused to render to your orator any account of the copartnership moneys received by him.

And your orator charges that he has, since the said dissolution, paid the sum of three hundred dollars in respect of the copartnership debts.

And your orator further charges that upon a just and true settlement of the said accounts it will appear that a considerable balance is due from the said defendant to your orator in respect to the said copartnership balances; but, nevertheless, the said defendant is proceeding to collect in the said copartnership debts and apply the same to his own use, which the said defendant is enabled to do by means of the possession of his books of account as aforesaid.

And your orator charges that the said defendant ought to be restrained by injunction by this honorable court from collecting in the said debts; and that some proper person ought to be appointed by this honorable court for that purpose: wherefore your orator prays that an account may be taken of all and every of the said late copartnership dealings and transactions until the time of the expiration thereof; and that the said Richard Roe may be directed to pay to your orator what, if anything, shall upon such account appear to be due from him, your orator being ready and willing, and hereby offering, to pay to the said Richard Roe what, if anything, shall appear to be due to him from said joint concern; and that some proper person may be appointed to receive and collect all moneys which may be coming to the credit of the said late co-

⁵ From Barton's *Suit in Equity*, p. 52.

partnership; and that the said Richard Roe may in the meantime be restrained by an order of injunction from this honorable court from collecting and receiving any debts due and owing thereto.

[Prayer for general relief, and for process, signature and verification, see Form No. 2, *supra*, p. 1766.]

FORM NO. 6.⁶

CROSS-BILL FOR FORECLOSURE.

In the Circuit Court of the United States for the District of Nebraska.

William D. Galbraith, Cross Complainant,
against

Solomon C. Maple, Phebe A. Maple, H. C. Bigelow, whose first name is Henry, First National Bank of Hebron, Nebraska, A. G. Collins, first name and real name unknown, Henney Buggy Company, a corporation, H. J. Bemis, first and real name unknown, Susie Bemis, Morris A. Bemis, and Leatha M. Bemis, Young, Knode & Co., a partnership and Claramon Hunt, Cross Defendants.

Cross Bill.

To the Honorable Judges of the Circuit Court of the United States for the District of Nebraska:

William D. Galbraith, cross complainant herein, a citizen of the state of Nebraska, and the same party who is made a defendant to the bill in *Etna Life Insurance Company v. Maple et al.*, exhibits this his cross bill and states as follows:

1. Upon July 17, 1891, the said Solomon C. Maple executed and delivered to the said H. C. Bigelow his certain promissory note in writing whereby said Maple promised to pay said Bigelow on or before Oct. 1, 1893, the sum of seven hundred and fifty dollars with interest thereon at the rate of seven per cent. per annum from July 17, 1891.

2. To secure the payment of the said note and on the same day the said Solomon C. Maple and Phebe Maple his wife, executed and delivered to said H. C. Bigelow a certain mortgage deed and thereby conveyed to said H. C. Bigelow the following real estate situate in Thayer county, Nebraska: (describing realty).

3. Said mortgage was conditioned that if the said Solomon C. Maple or his heirs, executors, administrators or assigns should pay to the said H. C. Bigelow, his executors, administrators or assigns, the sum of seven hundred and fifty dollars on the first day of October, 1893, with annual interest at the rate of seven per cent., principal and interest payable at the Thayer County Bank of

⁶ This cross-bill by a subsequent mortgagee's assignee in a suit for foreclosure is copied from the original papers in the case.

Hebron, Nebraska, and also pay all taxes and other assessments on said land during the continuance of this mortgage before said taxes should become delinquent then said mortgage should be void, otherwise to remain in full force and effect. Said mortgage was further conditioned as follows: (setting out condition).

4. Said mortgage was duly recorded on p. 249 of Mortgage Record 3 in the office of the county clerk of Thayer county, who is also a register of deeds therein, on Sep. 29, 1891, at 11 o'clock A. M.

5. No part of the debt evidenced by said note has ever been paid except the interest thereon to March 15, 1897, and there is now due and unpaid of said debt the principal sum of seven hundred and fifty dollars (\$750) with interest thereon at ten per cent. per annum from March 15, 1897. Said mortgage deed has now become absolute and this cross complainant is entitled to a foreclosure of all equities of redemption in the premises conveyed thereby.

6. Thereafter and long prior to the commencement of this suit the said H. C. Bigelow, for a valuable consideration, indorsed such note as follows: "H. C. Bigelow;" and said note together with said mortgage were duly delivered to this cross complainant, and he is now the holder and owner thereof.

7. No proceedings at law or otherwise have been instituted for the recovery of the debt secured by said mortgage nor has any part thereof been collected save interest as aforesaid; and the amount due thereon constitutes a first and paramount lien on the real estate above described, prior to the lien claimed by the *Aetna* Life Insurance Co. of Hartford, Conn., or to any other claims whatsoever.

8. The cross defendants Solomon C. Maple, Phebe A. Maple, H. C. Bigelow, whose first name is Henry, a citizen of the state of Utah, First National Bank of Hebron, Nebraska, a corporation existing under the laws of the United States, A. G. Collins, first and real name unknown, a citizen of Nebraska, Claramon Hunt, a citizen of the state of Connecticut, Henney Buggy Co., a corporation existing under the laws of the state of Illinois, H. J. Bemis, first and real name unknown, Susie Bemis, Morris A. Bemis, Leatha M. Bemis, the said four last named defendants being citizens of the state of Kansas, Young, Knode & Co., a partnership, organized and doing business in the state of Nebraska, and the *Aetna* Life Ins. Co. of Hartford, Conn., each claims to have some interest in the premises above described, the said Phebe A. Maple and Susie Bemis claiming a dower interest therein, but whatever the sum may be the interest of each of said defendants is inferior, subject and subsequent to the lien of this cross complainant by virtue of said note and mortgage as above set forth.

Wherefore this cross complainant prays, that the cross defendants, each and every of them be required to answer the foregoing cross bill but not upon oath or affirmation, the benefit of which is expressly waived; that the liens of each and every of the said cross defendants upon said mortgaged premises may be decreed to be subject, inferior and junior to that of this cross complainant's mortgage; that said cross defendants may be foreclosed and forever barred of all right, title, claim and equity of redemption in or to said premises or any part thereof; that an account may be taken of the sum due on the said note and mortgage; that the premises conveyed by said mortgage deed may be sold according to law under the order of this court and that the proceeds of said sale be applied first to the amount found due this cross complainant upon said note and mortgage including interest thereon and costs herein, and a reasonable sum as an attorney's fee; that upon confirmation of said sale the purchaser thereat may be put into possession of said premises and to that end may have such process from this court

and that they, your orators who constitute said firm, are greatly and directly injured by the infringements hereinafter complained of, and are equitably entitled to receive the profits which have been diverted from them by the acts of the said The Henry G. Allen Company, hereinafter set forth and complained of, and an account of which is hereinafter prayed for.

And your orators constituting the firm of Adam & Charles Black, after the said copyright had been taken by said Walker, exercised their rights in the premises and made use of said copyrighted book, and printed and sold the same in connection with, and as part of, their twenty-third volume of their said Ninth Edition of the "Encyclopaedia Britannica," and continue so to use said copyrighted book; and the right so to use the same is of great value and importance to them.

And your orators say that the whole of said copyright and all the privileges of every nature and description relating thereto, with the exception of the right to use the subject thereof in said Encyclopaedia, has always remained and continued to be the property of said Walker. And your orators aver that they are now well seized of said copyright, and are the owners thereof, and that the same is of great value and importance to them, and that they have the right to enjoy all the privileges secured and intended to be secured thereby; and that they now have, and have always had, since said copyright was obtained, copies of said copyrighted book exposed for sale, and that the public have been supplied with the same to their benefit and advantage and the profit of your orators.

And your orators further say that the said The Henry G. Allen Company, intending to injure your orators, and contriving to deprive them of the privileges which they were to receive from the sole and exclusive printing, publishing and vending the said book entitled "United States, Part III, Political Geography and Statistics," has unlawfully, and without the consent of your orators, printed, published and sold, or caused to be printed, published and sold, in said southern district of New York, since your orators' rights in the premises were acquired, as aforesaid, and since the recording of the title of said copyrighted book, a large number of copies of said copyrighted book, or a substantial part or parts thereof, which infringing books so printed, published and sold by said company have been in every way substantially the same as the book which is the subject of your orators' charge, were copied and pirated from your orators' copyrighted book, and the reprinting, publishing and sale of which by said company was a piracy and infringement of your orators' said copyright, and of their rights, and the rights of each and all of them, growing out of said copyright.

And your orators say that the said piratical books so printed in violation of your orators' rights, the said The Henry G. Allen Company has caused to be used in connection with and as part of a so-called "reprint" of the said Encyclopaedia Britannica, Ninth Edition, of your orators who constitute the firm of Adam & Charles Black, the same having been printed and used in every way as said copyrighted book had been printed and used by your orators constituting the firm of Adam & Charles Black, in pursuance of their rights in the premises, and as hereinbefore set forth; except that the said The Henry G. Allen Company has omitted the marginal notes of the original and the copyright notice applied upon the title-page of said copyrighted book, to wit: "Copyright 1888, by Francis A. Walker." All of which matters and things acted and done by the said The Henry G. Allen Company are contrary to equity and good conscience, and a great and continuing injury to your orators and to each and all of them.

ceedings and decree now remaining as of record in this honorable court, reference being thereunto had, will more fully appear.

And your orator further showeth unto your honor that the commission awarded by the said decree never issued, on account of the said Samuel Short going abroad, and being, until lately, out of the jurisdiction of this honorable court; but the said Samuel Short having now returned, and the inconvenience mentioned in your orator's former bill still existing, your orator is desirous of having the said decree forthwith carried into execution, but from the great length of time which has elapsed, and the refusal of the said Richard Roe to concur therein, your orator is advised the same cannot be done without the assistance of this honorable court.

To the end, therefore, that the said Richard Roe may, upon his corporal oath, (interrogatories in usual form); and that the said decree may be directed to be forthwith carried specifically into execution; and the said Richard Roe ordered to do and concur in all necessary acts for that purpose. [Prayer for general relief and for process and signature, see Forms Nos. 2, 3, *supra*, pp. 1766, 1773.]

FORM NO. 8.

PRAEICE FOR SUBPOENA AD RESPONDENDUM.

....., Esq., Clerk of United States Circuit Court for
the Southern District of New York:

You will please issue a subpoena to the defendant, Richard Roe, in the above entitled cause, returnable on the first Monday of January, 1909.

RICHARD T. HIGGINS,
Solicitor for Complainant,
200 Broadway, New York, N. Y.

Dated December 5, 1908.

FORM NO. 9.^a

SUBPOENA AD RESPONDENDUM.

United States of America.

In the Circuit Court of the United States, Second Circuit, Southern District
of New York.
In Equity.

The President of the United States of America, to Richard Roe, Greeting:

You are hereby commanded that you, Richard Roe, personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of January, A. D. 1904, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by John Doe, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

^a See Equity Rule 12, as amended December 17, 1900, 129 U. S. 641.

Witness, Honorable Melville W. Fuller, chief justice of the Supreme Court of the United States, at the city of New York, on the tenth day of December, in the year one thousand eight hundred and ninety-three, and of the independence of the United States of America the one hundred and seventeenth.

JOHN A. SHIELDS, Clerk.

JONES & SMITH, Complainant's Solicitors,
120 Broadway, New York, N. Y.

You are hereby commanded to enter your appearance in the above suit, on or before the first Monday of January, 1894, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

JOHN A. SHIELDS, Clerk.

FORM NO. 10.

PRAECLYPE FOR APPEARANCE.

[Title of court and cause.]

To the Clerk of the United States Circuit Court for the Southern District of New York:

You will please enter my appearance for the defendant,
in the above-entitled cause.

JAMES P. GLYNN,
Solicitor for Defendant,
165 Broadway, New York, N. Y.

Dated New York, January 10, 1909.

FORM NO. 11.*

EXCEPTIONS TO BILL FOR SCANDAL OR IMPERTINENCE.

[Title of court and cause.]

Exceptions taken by Richard Roe, defendant, to the bill of complaint of John Doe, complainant, filed against him.

First Exception.—For that the allegation in the third line of the third page of the said bill, in the words following, to wit, "then being, and for a long time before having been, a professed friend of your orator," is impertinent and ought to be expunged.

Second Exception.—For that the allegation on the third page after the words "William West," that is to say, "who had patronized him in business and rendered him considerable service by indorsing his notes, and otherwise befriending him," is impertinent and ought to be expunged.

Third Exception.—For that the allegations in the said bill, commencing in the sixth line of the third page thereof with the words following, to wit, "that at

* See Equity Rules 26, 27.

the commencement of the said partnership," and ending at the third line of the fourth page thereof with the words "discounted at the said bank," are scandalous and impertinent and should be expunged.

In all which particulars the said defendant humbly insists that the complainant's said bill of complaint is irrelevant, impertinent and scandalous.

Wherefore, the said defendant excepts thereto, and humbly prays that the impertinence and scandal of the said bill of complaint excepted to as aforesaid may be expunged, with costs.

OLIVER ELLSWORTH,
Counsel for Defendant.¹⁰

FORM NO. 12.¹¹

AFFIDAVIT AND CERTIFICATE TO DEMURRER.

State of New York,
Southern District of New York, } ss.
City and County of New York.

Henry G. Allen, being duly sworn, deposes and says: I am president of the Henry G. Allen Company, a corporation, and which is the defendant in the above entitled suit, and I further depose and say that the above demurrer is not interposed for delay.

HENRY G. ALLEN.

Subscribed and sworn to before me this 19th day of March, A. D. 1890.
ALBERT C. AUBERY, Notary Public, Kings Co.

Certificate filed in N. Y. Co.

I, hereby certify that I am the solicitor and of counsel for the Henry G. Allen Company, a corporation, the defendant above named, and that in my opinion the demurrer of the said Henry G. Allen Company interposed to the bill of complaint of the complainant in the above cause, is well founded in point of law, and proper to be filed in the above cause.

Solicitor and of Counsel for Defendant.

FORM NO. 13.¹²

DEMURRER FOR MULTIFARIOUSNESS.

[Title of court and cause, see Forms Nos. 2, 3, *supra*, pp. 1766, 1773.]
[The demurrer of defendant, to the bill of complaint
of complainant:

The defendant, by protestation not confessing nor acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such

¹⁰ Exceptions must be "signed by counsel." Equity Rule 27.

¹¹ Copied from the record in *Black v. Henry G. Allen Co.* 42 Fed. Rep. 618. For other pleadings and proceedings in the same case, see Form No. 3, *supra*, p. 1773, Forms Nos. 43, 45, *infra*, pp. 1818, 1821. Necessity of affidavit and certificate, see Equity Rule 31, *supra*, p. 1074.

¹² Copied from *Hayes v. Dayton*, 8 Fed. Rep. 703.

manner and form as the same are therein and thereby set forth and alleged, demurs to the said bill, and for cause of demurrer shows:] that it appears by the said bill that it is exhibited against this defendant for several and distinct matters and causes, in many whereof, as appears by said bill, the defendant is not in any manner interested or concerned, and which said several matters and causes are distinct and separate one from the other, and are not alleged in said bill to be conjointly infringed by said defendant. By reason of the distinct matters therein contained the complainant's bill is drawn out to considerable length, and the defendant is compelled to take a copy of the whole thereof, and by joining distinct matters together, which do not depend upon each other, in the said bill, the pleadings, orders and proceedings will, in the progress of the said suit, be intricate and prolix, and the defendant be put to unnecessary charges in taking copies of the same.

Wherefore and for divers other good causes of demurrer appearing in the said bill, the defendant demurs thereto, and demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

[..... Solicitor and counsel for defendant.]
Add affidavit and certificate as in Form No. 13, *supra*, p. 1787.

FORM NO. 14.¹³

ANOTHER DEMURRER FOR MULTIFARIOUSNESS.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

That it appears by the said bill that the same is exhibited by the complainant Isaac N. Jenness, and the several other persons therein named as complainants thereto, for distinct matters and causes, in several whereof, as appears by the said bill, the said complainants are not in any manner in common or jointly interested or concerned, and that the bill is multifarious, and that the said complainants have not, in and by their said bill, made or stated such a case as entitles them in a court of equity to any relief from or against this defendant touching the matters contained in said bill, or any of such matters.

Wherefore (concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

FORM NO. 15.¹⁴

DEMURRER FOR DEFENDANTS WANT OF INTEREST IN SUBJECT-MATTER.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

That the scope and end of the complainant's bill is to be relieved touching several sums of money by the said bill supposed to be due from these defendants

¹³ Copied from Jenness v. Smith, 64 Mich. 91.
¹⁴ From 2 Harr. Ch. Pr. p. 415.

to one Edward Frost, deceased, in the said bill named, which the complainants would, or seek by their said bill to claim as executors to the said Edward Frost, and yet have not alleged in or by their said bill, that they have proved the will of the said Edward Frost, if any such was made, or otherwise taken upon them the burden or execution thereof, or anyways entitled themselves unto his personal estate, and to sue for the same. Wherefore, and forasmuch, as the said complainants have not well and sufficiently entitled themselves in and by their said bill to the said moneys, if they had been due from these defendants or either of them, to the said Edward Frost, as is thereby supposed, and for that, should these defendants pay the money demanded by the said bill to the complainants before they have either proved the will or sued out administration, they cannot sufficiently, as these defendants are advised and insist, discharge these defendants, nor give these defendants any proper receipt or receipts for the same, but that they shall or may be liable to be questioned again by such person as may sue out administration to the said Edward Frost with the said will annexed, or otherwise. Wherefore (continuing and concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

FORM NO. 16.¹⁵

DEMURRER FOR DEFENDANT'S WANT OF INTEREST IN SUBJECT-MATTER.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

For that the said complainant hath not, by his said bill, which seeks to set aside the award therein set forth, and to which this defendant is made a party in his character of an arbitrator, shown that he can have any decree against this defendant, whose answer could not be read as evidence against the other defendants to the said bill, or any of them; and the said complainant, for anything that appears in the said bill to the contrary, might examine this defendant as a witness in this suit. Wherefore (continuing and concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

FORM NO. 17.¹⁶

DEMURRER SPECIFYING SEVERAL GROUNDS.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

"], That it appears by said bill that the same is exhibited against this defendant, and the several other persons therein named as defendants thereto,

¹⁵ From Curt. Eq. Prac. p. 147.

¹⁶ Copied from Dunston v. Hoptonic Co., 83 Mich. 381,

for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious.

"2. That it doth not appear by said bill that all the solvent stockholders of said Hoptonic Company who are within the jurisdiction of this court are made parties thereto.

"3. That it doth appear by said complainant's bill that there are stockholders in said Hoptonic Company other than those made parties to this suit, and it doth not appear from said bill that such stockholders are insolvent or beyond the jurisdiction of this court, nor doth it in any manner sufficiently appear therefrom why such other stockholders are not made parties to said bill; yet the said complainant hath not made them parties thereto.

"4. That it doth appear by said complainant's bill that Walter S. Hicks and Charles F. Cobb, residents of the State of Michigan, and within the jurisdiction of this court, were stockholders of said Hoptonic Company, and it doth not in any manner sufficiently appear from said bill why the said Walter S. Hicks and Charles F. Cobb are not made parties to said bill; yet the said complainant hath not made them parties thereto.

"5. That the said complainant hath not in and by his said bill made or stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant."

Wherefore (continuing and concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

FORM NO. 18.*

ANOTHER DEMURRER SPECIFYING SEVERAL GROUNDS.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

- (1.) The allegations of said bill are too uncertain, vague and indefinite.
- (2.) The bill does not set out with sufficient certainty the claim of complainant in the subject-matter of the suit.
- (3.) The bill does not sufficiently set out title of complainant in the subject-matter of suit.

(4.) The bill does not set out with sufficient certainty to what portion of the stream mentioned, or bed thereof, complainant's claim extends.

(5.) Complainant does not allege that said stream or portions thereof, from which phosphate is alleged to be taken, or on account of which relief or discovery is sought, is within tide-water.

Wherefore (continuing and concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

*⁷ Copied from State v. Black River P. Co., 27 Fla. 320,

FORM NO. 19.¹⁸**PLEA IN ABATEMENT ON GROUND OF ANOTHER SUIT PENDING.**

In the Circuit Court of the United States, for the District of Nebraska.

The Rhode Island Hospital Trust Company, a corporation, and Ross R. Mattis, Trustee, complainants,
against

William J. Hanna, Nellie M. Hanna, Charles Van Duyn, Lydia A. Van Duyn, E. W. Van Duyn, full Christian name unknown, The Lincoln Savings Bank and Safe Deposit Company, a corporation, John E. Hill, as Receiver of the Lincoln Savings Bank and Safe Deposit Company, David Bradley & Company, a corporation, The State Bank of Belvidere, Nebraska, a corporation, J. W. Maple, full Christian name unknown, The Thayer County Bank, a corporation, Charles E. Baker, J. W. Lamm, full Christian name unknown, A. G. Collins, full Christian name unknown, Defendants.

} In Chancery.

Plea in abatement of the Lincoln Savings Bank and Safe Deposit Company, a corporation, and John E. Hill as receiver thereof to the bill of complaint of the Rhode Island Hospital Trust Company, a corporation, and Ross R. Mattis, trustee.

To the Honorable Judges of the Circuit Court of the United States, for the District of Nebraska:

1. These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint mentioned and contained to be true, in such sort, manner and form as the same are therein set forth and alleged, for plea to the whole of said bill, and to the jurisdiction of this court and for the matter in abatement of this suit allege:

2. That on the twenty-second day of January, 1896, John E. Hill was by the District Court of Lancaster county, Nebraska, duly and legally appointed the receiver of the Lincoln Savings Bank and Safe Deposit Company, and did proceed to qualify and has been ever since and is now acting as such, he being the defendant John E. Hill, as receiver of the Lincoln Savings Bank and Safe Deposit Company.

3. That on April 20th, 1895, the defendant Charles R. Van Duyn and one J. Z. Briscoe, being indebted to the Lincoln Savings Bank and Safe Deposit Company

¹⁸ Plea by a second mortgagee and its receiver to a bill for foreclosure, Copied from the original papers in the case.

in the sum of two thousand eight hundred and seventy dollars, did make, execute and deliver to the said Lincoln Savings Bank and Safe Deposit Company their certain promissory note in words and figures following, to wit: (setting out note verbatim).

4. That on the 31st day of January, 1896, the defendant Charles R. Van Duyn did make, execute and deliver to the Lincoln Savings Bank and Safe Deposit Company his certain promissory note for the sum of two hundred and fifty dollars, in words and figures following (setting out note verbatim).

5. The above described promissory notes were given for an indebtedness from the said parties to the said the Lincoln Savings Bank and Safe Deposit Company, and contracted prior to the seventh day of May, 1894, and defendant says that on the seventh day of May, 1894, [for] the purpose of securing the indebtedness evidenced by the above described promissory note the defendant Charles R. Van Duyn, who was then seized in fee of the premises hereinafter described, did, together with the defendant Lydia A. Van Duyn, his wife, make, execute and deliver to the said the Lincoln Savings Bank and Safe Deposit Company their certain warranty deed in words and figures following, to wit: (setting out deed verbatim).

6. Said deed was filed for record in the office of the county clerk of Thayer county, Nebraska, January 24th, 1896, and recorded in book 4 of deeds on page 553.

7. Subsequently the said the Lincoln Savings Bank and Safe Deposit Company did take up and pay off two interest coupons secured by a certain mortgage of four thousand dollars on said premises; said interest coupons were taken up and paid off in pursuance of the agreement between the said Lincoln Savings Bank and Safe Deposit Company and the defendants Charles R. Van Duyn and Lydia A. Van Duyn to the effect that said deed shall be held by it as security therefor, and said interest coupons were in words and figures following, to wit: (setting out interest coupons verbatim).

8. No part of the indebtedness above mentioned has yet been paid, excepting the sum of one hundred and fifty-one dollars and seventy-five cents, which was paid on the sixth day of May, 1896, and there is now due thereon to these defendants the sum of three thousand four hundred and eighteen dollars and eighty cents with interest on the sum of three thousand and eighteen dollars and eighty cents at the rate of ten per cent. per annum from the sixth day of May, 1896, and interest at the rate of ten per cent. per annum on the sum of two hundred and fifty dollars from the thirty-first day of January, 1896, and interest at the rate of ten per cent. per annum on the sum of one hundred and twenty dollars from the first day of April, 1896, and interest at the rate of ten per cent. per annum on the sum of thirty dollars from the first day of April, 1896.

9. That on the seventh day of November, 1896, this defendant John E. Hill, as receiver of the Lincoln Savings Bank and Safe Deposit Company, commenced an action in the District Court of Thayer county, Nebraska, in which his co-defendants herein were defendants and in which action he sought for the foreclosure of his said lien upon the property in controversy in this suit. In said suit the defendant and cross-complainant herein, Charles E. Baker, was a defendant, summons was duly issued and served upon the resident defendants therein long prior to the commencement of this suit and on or about the eighth day of November, 1896, a summons was issued therein directed to the sheriff of Gage county, Nebraska, for the defendant Charles E. Baker, which said summons was not

served, and again on the twenty-eighth day of July, 1897, an alias summons was issued therein for defendant Charles E. Baker which was served on the twenty-ninth day of July, 1897, and these defendants allege that said foreclosure proceeding in said District Court of Thayer county, Nebraska, is still pending and undetermined in said court; that the property in controversy herein is in *custodia legis* and in the hands of said District Court, and at the commencement of this action said District Court of Thayer county, Nebraska, had full jurisdiction of said action and of the rights of these answering defendants and of the said Charles E. Baker in and to the property in controversy in this suit, and had charge, custody and control of said property and jurisdiction thereof; that the issues tendered in the petition of the plaintiff in that court with respect to the interests of the said Charles E. Baker are contradictory to the interests of the said Baker as tendered in his cross bill in this court. And these defendants further allege that if the relief prayed for in that petition be granted to the plaintiff thereon and the relief prayed for in the bill of the complainants herein and cross bill of the defendant Charles E. Baker herein should all be granted, there would then be a conflict in the relief so granted in this court with the relief granted in the District Court of Thayer county, Nebraska, and a conflict of jurisdiction, all of which is made more definite by the production of a certified copy of the petition, summons and the service thereon in said cause, pending in the District Court of Thayer county, Nebraska, which are tendered in court upon the hearing of this plea.

All of which matters and things these defendants doth aver to be true and plead the said facts to the said complainants' bill, and pray the judgment of this honorable court whether they ought to be required to make any other or further answer to the said bill, and most wrongfully sustained, or that this action may be held in abeyance until after the termination of the jurisdiction of the District Court of Thayer county, Nebraska, in, over and to the property in controversy in this suit.

JOHN E. HILL, Receiver
of the Lincoln Savings Bank and Safe Deposit Company.
By A. S. TIBBETS and L. C. BURR, their [Counsel].

The State of Nebraska, } ss.
Lancaster County. }

John E. Hill, as receiver of the Lincoln Savings Bank and Safe Deposit Company, a corporation, makes solemn oath and says that he is one of the defendants; that the foregoing plea is not interposed for delay and that the same is true in point of fact.¹⁹

JOHN E. HILL, Receiver.

Subscribed in my presence and sworn to before me this thirty-first day of July, A. D. 1897.

W. E. BAKERLY, JR., Notary Public.

A. S. Tibbets, and L. C. Burr, attorneys for the answering defendants the Lincoln Savings Bank and Safe Deposit Company and John E. Hill, as receiver

¹⁹ Necessity of affidavit to plea, see Equity Rule 31, *supra*, p. 1674.
Eq. Prac. Vol. III.—113.

of the Lincoln Savings Bank and Safe Deposit Company, do hereby certify that in my opinion the foregoing plea is well founded in point of law.²⁰

A. S. TIBBETS, and L. C. BURR [Counsel for receiver].

FORM NO. 20.²¹

PLEA TO BILL TO CARRY DECREE INTO EXECUTION.

[Title of court and cause, see Form No. 19, *supra*, p. 1791.]

The plea of Richard Roe, defendant, to the bill of complaint of John Doe, complainant. This defendant (or these defendants respectively) by protestation not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint mentioned and contained to be true, in such sort, manner and form as the same are therein set forth and alleged, for plea to the whole of the said bill (or to so much and such part of said bill as prays, setting out prayer, or seeks a discovery from this defendant whether, setting out the matter as in the prayer), says that he is advised that the complainant by his bill claims to be entitled to divers lands in his said bill mentioned, for the term of his life, by virtue of the last will and testament of John Doe, in the said bill mentioned, to bear date the tenth day of June, 1844, and prays that he may have the benefit of a certain decree of this honorable court, made in a cause wherein the said John Doe was complainant and this defendant was defendant, and that such decree may be carried into execution; to which bill this defendant doth plead, and for plea saith, that the will of the said John Doe, in the complainant's bill mentioned, was not duly executed and attested so as to pass real estates, and therefore the lands therein, and in the said complainant's said bill mentioned, descended to John Smith, of (stating place), as the heir-at-law of the said John Doe; wherefore this defendant is advised that the complainant is not entitled to have the benefit of the decree, or to have the same carried into execution; and this defendant demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed, with his reasonable costs in this behalf sustained.

JEREMIAH MASON, Solicitor for Defendant.

ANDREW JACKSON, of Counsel.

[Add affidavit and certificate as in Form No. 19, *supra*, p. 1791.]

FORM NO. 21.²²

DISCLAIMER.

[Title of court and cause, see Form No. 19, *supra*, p. 1791.]

The several answer and disclaimer of Richard Roe, one of the defendants, to the bill of complaint of John Doe and Samuel Short, complainants.

This defendant, saving and reserving to himself now and at all times hereafter, all manner of advantage and benefit of exception that may be had and taken to

²⁰ Necessity of certificate of counsel, see Equity Rule 31, *supra*, p. 1674.

²¹ From 3 Barb. Ch. Pr., 2d ed., p. 237, No. 316. Bill to carry decree into execution, see Form No. 7, *supra*, p. 1784.

²² From 2 Harr. Ch. Pr. 401.

the many untruths, uncertainties, insufficiencies and imperfections in the said complainants' said bill of complaint contained for a full and perfect answer thereunto, or to such part thereof as it materially concerns this defendant to make answer unto, he answereth and saith, That he believes that Leonard A. Ford did die seized of such estates in and as in the said complainants' said bill are mentioned; and this defendant does believe that the said Leonard A. Ford did make such last will and testament in writing and did thereby create such trusts out of the said estates, and appointed this defendant trustee thereof, in such manner and to such purport and effect as in the said complainant's said bill for that purpose set forth; and this defendant does believe that the said testator made Charles Mainjoy, gent., executor of his said will; and this defendant does believe that the said Leonard A. Ford, soon after making his said will, departed this life, that is to say, on or about the tenth day of May in the year 1812, without revoking or altering his said will, seized of such estates in and as in the said complainant's said bill are set forth: And this defendant further saith, that he was advised that the said trust would be attended with some difficulty, besides expense and loss of time to this defendant; therefore this defendant absolutely refused to intermeddle therewith, or any way concern himself therein: And this defendant denies that he, or any for him, ever entered on the said trust estate, or ever received any of the rents and profits thereof; but this defendant hath been informed and believes the same were received by Thomas Hart, of the city of Leeds, in the county of York, gent., who was employed by the said testator Leonard A. Ford in his life-time to receive the rents and profits of the said estate for the said Leonard A. Ford, and this defendant doth believe that the said Thomas Hart hath received the said rents and profits of the said trust-estate ever since the death of the said testator Leonard A. Ford, and still doth continue to receive the same: And this defendant positively denies that the said Thomas Hart had any power, authority or direction from this defendant to receive all or any part of the rents and profits of the said trust-estate, or that he ever accounted with this defendant for the same: And this defendant is very desirous and ready to be discharged from his said trust, and to do any act for that purpose as this honorable court shall direct, this defendant being indemnified in so doing, and having his costs. And this defendant further saith, that as to so much of the said bill as seeks a discovery of this defendant's title to the lands in this defendant saith, that he doth not know that he this defendant to his knowledge or belief ever had, nor did he claim or pretend to have, nor doth he now claim or pretend to have, any right, title or interest of, in or to the said estate in in the said complainants' bill set forth, or any part thereof; and this defendant doth disclaim all right, title and interest to the estate in in the complainants' said bill mentioned and every part thereof. And this defendant doth deny all manner of unlawful combination and confederacy unjustly charged against him in and by the said complainants' said bill of complaint;²³ without that, that any other matter or thing in the said complainants' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered unto, confessed or avoided, tra-

²³ If the complainant's bill does not contain the common confederacy clause (see Equity Rule 21, *ante*, p. 1670) the denial thereof in the disclaimer should of course be omitted.

versed or denied, is true: All which matters and things this defendant is ready to aver, maintain and prove, as this honorable court shall award; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

[Signature of counsel and of the defendant.]²⁴

FORM NO. 22.²⁵

ANSWER DENYING INFRINGEMENT OF COPYRIGHT.

United States Circuit Court, Northern District of New York.

West Publishing Company }
 vs. }
Lawyers' Co-operative Publishing Company. }

The defendant, for answer to the bill of complaint exhibited herein, says: It admits that the plaintiff is a corporation organized under the laws of the state of Minnesota, and having its principal office and place of business at the city of St. Paul in said state, and that the plaintiff has carried on and still carries on its business at the city of St. Paul, aforesaid; and that the defendant is a corporation organized under the laws of the state of New York for the purposes alleged in said bill of complaint, and has carried on and still carries on its business at the city of Rochester in said state; and that the business so carried on by the said defendant and the said plaintiff is correctly stated in said bill of complaint.

Said defendant, further answering, admits that the plaintiff has published the various books or works alleged to have been published by it in said bill of complaint, and that the same were printed from plates made from type set within the limits of the United States, but whether said plaintiff has taken the various steps to secure a copyright upon or for said works, or whether said defendant has acquired a copyright therein, or in any of the same, as stated in said bill of complaint, this defendant has no knowledge or information sufficient to form a belief, and, therefore, leaves the plaintiff to its proof.

Said defendant admits that each and all of said permanent or complete volumes of reports, as well as each and all of said advance numbers or books embodied in said volumes, were prepared, arranged and reported under the direction of the plaintiff, and that each and all of said advance numbers, volumes, or books contained matter original with the plaintiff, but whether the amount of the original matter contained in said volumes, advance numbers or books is large or otherwise, or whether the same is a private property of the plaintiff as author or proprietor, and whether the plaintiff has obtained copyrights thereon, as alleged in said bill of complaint, this defendant has no knowledge or information sufficient to form a belief.

²⁴ A disclaimer should be signed by counsel and by the defendant.

²⁵ Copied from the record in West Pub. Co. v. Lawyers' Co-operative Pub. Co. 79 Fed. Rep. 756. For other pleadings and proceedings in the same case see Form No. 2, *supra*, p. 1786, and Form No. 23, *infra*, p. 1799.

Said defendant further says that it has no knowledge or information sufficient to form a belief as to the way in which said reports, numbers, or books were prepared and reported, or at what labor and expense, and, therefore, leaves the plaintiff to its proof. The said defendant admits that the syllabi and head-notes, and preliminary statements of facts, except where prepared by the court, were original with said plaintiff, and were made, edited and published as stated in said bill of complaint, and that the syllabi or head-notes of cases reported in each permanent or completed volume were by the plaintiff alphabetically arranged, and reprinted as an index at the end of such volume, as is alleged in said bill of complaint.

Said defendant further admits that the American Digest Monthly of said plaintiff, and the Annual Digest of said plaintiff for the year 1892, were principally compiled from and composed of the syllabi or head-notes of the cases originally prepared for and published in the advance numbers of its permanent edition of its reporters, and which were from time to time reprinted in the advance numbers or monthly parts of its digest; but whether the said syllabi or head-notes, made, edited or prepared by the plaintiff for its system of reports and advance numbers, were made, edited and prepared with special reference for use as digest paragraphs in the index digests to each complete volume of reports and in the monthly or advance digest sheets or pamphlets, and also in the American Annual Digest, or permanent digest for each year, this defendant has no knowledge or information sufficient to form a belief.

Said defendant admits that the said American Annual Digest, and said advance numbers of said Monthly Digest, became and were convenient and were of value to all persons desiring to use the same, but whether of great value or what value, this defendant has no knowledge or information sufficient to form a belief.

The defendant admits that the plaintiff has from time to time printed and sold a large number of said volumes and of said advance numbers, and of its American Annual Digest and of its monthly advance numbers or books, but whether to the amount of several thousands of each of said volumes, or to what amount, this defendant has no knowledge or information sufficient to form a belief.

It admits that the plaintiff has caused to be printed and inserted in its copies or volumes, and in the permanent and completed books or editions, and in each advance number or book, and in each of the complete and permanent volumes or books, notice that the same were copyrighted, as required by law, as alleged in said bill of complaint. Whether the plaintiff has ever sold or transferred any of said copyrights this defendant has no knowledge or information sufficient to form a belief.

It admits that the plaintiff has never authorized this defendant to publish any of said volumes of reports, or the syllabi or head-notes thereof, or extracts, excerpts or abridgments thereof, except such right as was conferred upon the defendant and upon the public at large to make use of such publication, by reason of the publication thereof. The defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff is the exclusive owner and proprietor of all the said copyrights, or whether it has the sole and exclusive right in each and all of the syllabi, head-notes and preliminary statements of facts contained in said volumes, in advance numbers or books, and reprinted in said Annual or Monthly Digests, as aforesaid; or whether it has the exclusive right to the head-notes, head-lines or catch-words, preliminary statements of facts, abstracts of arguments of counsel, arrangements and division of the cases into volumes, notes of authori-

ties added to any of the cases reported, indices or index digests in and for each complete volume of reports, and of all matter, excepting the opinions and decisions of said courts, or any of the matters in said bill of complaint stated.

The defendant denies that the value of said advance numbers, books, annual digests and monthly digests, mentioned in the said bill of complaint, is \$300,000, or any like sum, or that the loss or damage to the plaintiff by the violation of any of its rights mentioned or alleged in said bill of complaint is of that or any similar amount; but as to what is the value of said books, advance numbers and digests, this defendant has no knowledge or information sufficient to form a belief, and it denies that the plaintiff has sustained any loss or damage by reason of violation of any of its rights alleged in said bill of complaint.

This defendant admits that in its business of publishing and selling law-books, reports and digests, it does and has for several years past published and sold annually a volume known and called the General Digest, of which it publishes and issues advance sheets semi-monthly, and that said digest and advance sheets or numbers are published and sold in competition with the advance numbers or books of the plaintiff, including its annual or monthly digest.

Said defendant, further answering said bill of complaint, says, that it denies each and every allegation in said bill of complaint charging this defendant with using or intending to use the syllabi or head-notes of the plaintiff, or any of them, or reprinting, publishing or selling in large numbers, or any numbers, in advance numbers of its General Digest, or otherwise, statements of facts, syllabi or head-notes, taken, copied, or pirated from the volumes of reports of the plaintiff, or from the advance numbers or books thereof, or from its annual or monthly digest, or that it has used or employed, principally or at all, in preparing its General Digest for 1892, the head-notes or points issued and published by the plaintiff, or that said head-notes or points issued and published by the defendant are largely, or at all, copies of and piracies upon the head-notes or points of the plaintiff, made, prepared and edited by it, and published in its volumes, advance numbers or books, as charged in said bill of complaint.

The said defendant denies that, in preparing its General Digest for publication, and the advance numbers thereof, it has substantially, or at all, copied the head-notes and syllabi previously prepared and published by the plaintiff, or that it has resorted to any of the devices in reference thereto charged in said bill of complaint, or that it has availed itself of the original work, method and ideas of the plaintiff, in making and preparing its head-notes, or in digesting cases, as charged in said bill of complaint; and it denies that any of its publications are pirated from, either wholly or in part, the publications of the said plaintiff.

The defendant denies that its General Digest for 1892, or the advance numbers thereof, are infringements of or piracies upon the copyrights, if any, of the plaintiff.

The defendant admits that its publications were made and intended to take the place of, and, as far as possible in legitimate business competition, supersede the books and advance numbers of the plaintiff; but it denies that it has resorted to any of the arts or devices to secure the object inconsistent with legitimate business competition, and it denies, upon information and belief, that it has been and is selling large numbers of its advance sheets or numbers of its digests to persons who would otherwise have bought the volumes and advance numbers of the plaintiff, or its annual or monthly digest for 1892; and it denies that the plaintiff has sustained loss and damage by any act of this defendant; and it denies that

it has or will sell large, or any, numbers of its General Digest for 1892 to persons who would otherwise buy the Annual Digest of the plaintiff, to its loss or damage, which sales were procured, or will be procured, by means of any of the wrongful or illegal arts or devices charged in said bill of complaint; and it denies that it has done any act contrary to equity and good conscience, and which tends to the wrong and injury of the plaintiff.

The defendant denies each and every allegation in said bill of complaint not hereinbefore specifically answered unto, and prays that it may be hence dismissed, with costs.

LAWYERS' CO-OPERATIVE PUBLISHING CO.,
By JAMES E. BRIGGS.
COGSWELL, BENTLEY & COGSWELL,
Defendant's Solicitors.
WILLIAM F. COGSWELL,
Of Counsel.

FORM NO. 23.*

REPLICATION.

Circuit Court of the United States, Northern District of New York.

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| The West Publishing Company, complainant, vs. The Lawyers' Co-operative Publishing Company, defendant. | } In Equity. |
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The replication of the West Publishing Company, complainant, to the answer of the Lawyers' Co-operative Publishing Company, defendant.

This replicant saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant. Without this that any other matter or things whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true. All which matters and things this replicant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its bill it has already prayed.

PIERRE E. DU BOIS,
Solicitor for Complainant.

* Copied from the record in West Pub. Co. v. Lawyers' Co-operative Pub. Co. 79 Fed. Rep. 756. For other pleadings in the same case see Forms Nos. 2, 22, *supra*, pp. 1766, 1796.

FORM NO. 24.²⁷

ORDER SUSTAINING DEMURRER.

In the Circuit Court of the United States for the District of Nebraska.

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| Rhode Island Hospital Trust Company, et al., complainants, against William J. Hanna and Nellie M. Hanna et al., defendants and respondents. | } Order. |
|---|----------|

This cause came on for hearing at the present term upon the demurrer of the defendant William J. Hanna and the demurrer of the defendant Nellie M. Hanna to the bill of complaint herein, the same being argued and submitted by counsel; upon consideration whereof, it appearing to the court that said bill of complaint states no cause of action against either of said defendants, the court doth sustain said demurrs.

It is therefore considered and adjudged by the court that the prayer of the demurrs of the said defendants be granted; that the defendant William J. Hanna be hence dismissed without a day and recover his costs, taxed at (stating amount), and that the defendant Nellie M. Hanna be hence dismissed without a day and recover her costs, taxed at (stating amount).

W. H. MUNGER, Judge.

Omaha, Nebraska, April 9, 1898.

FORM NO. 25.²⁸

ORDER SUSTAINING DEMURRER AND DISMISSING BILL.

In the Circuit Court of the United States for the Eastern District of Texas.

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| Minnie M. Appleton et al., complainants, against James H. Smelser et al., defendants. | } Decree. |
|---|-----------|

This cause coming on to be heard upon the defendants' demurrer to plaintiffs' bill, and after hearing arguments of counsel and duly considering said demurrer, the court is of the opinion that the demurrer should be sustained. It is therefore ordered, adjudged and decreed by the court that the defendants' demurrer to plaintiffs' bill be in all things sustained, that plaintiffs' bill filed in this cause be dismissed, that the defendants recover their costs, and that the plaintiffs be adjudged to pay all costs incurred in this cause, for which let this execution issue.

DAVID E. BRYANT, Judge.

²⁷ Copied from the original papers in the case.

²⁸ Copied from Appleton v. Smelser, 60 Fed. Rep. 138.

FORM NO. 26.²⁹

ORDER OVERRULING DEMURRER.

[Title of court and cause, see Form No. 24, *supra*, p. 1800.]

The demurrer of the said defendants to the bill of complaint of said complainant having been brought on for argument before said court, and after hearing Messrs. O. T. Tuthill and Howard & Ross, solicitors for complainant, in opposition thereto, and Messrs. Edwards & Stewart, solicitors for defendants, and Messrs. Osborn & Mills, of counsel for defendants, in support of said demurrer, and after due consideration of the same, it is ordered by the court that the same be and is hereby overruled, with costs to be taxed.

[Ordered this the 17th day of January, 1909.

(Signed) Judge.]

FORM NO. 27.³⁰

RESTRAINING ORDER ENJOINING LABORERS AND LABOR ORGANIZATIONS.

James Sloan, Jr., complainant,
vs.
Eugene V. Debs et al., defendants. }

On this, the 4th day of August, 1897, the complainant in this action, by A. B. Fleming, his counsel, presented to the undersigned, one of the judges of the Circuit Court of the United States for the District of West Virginia, his bill of complaint alleging, among other things, that the defendant, in conjunction with other defendants in the bill named, were conspiring together to interfere with the operating and conducting of the coal mines operated by the Monongah Coal and Coke Company, and by such interference preventing the employees of the Monongah Coal and Coke Company from mining and producing coal in and from the said mines; and that unless the court granted an immediate restraining order preventing them from interfering with the employees of the owners of said mines, there was great danger of irremediable injury, damage, and loss to the owners of said mines.

Upon consideration whereof the bill is ordered to be filed and process issued thereon, and a temporary restraining order is allowed, restraining and inhibiting the defendants and all others associated or connected with them from in any wise interfering with the management, operation, or conducting of said mines by their owners or those operating them, either by menaces, threats, or any character of intimidation used to prevent the employees of said mines from going to or from said mines, or from engaging in the business of mining in said mines.

²⁹ Copied from *Shaw v. Chase*, 77 Mich. 438.

³⁰ This was the decree of Judge Jackson in the case of *Sloan v. Debs* (the Monongah Coal and Coke Company case) in the United States Circuit Court for the District of West Virginia, in 1897.

And the defendants are further restrained from entering upon the property of the owners of the said Monongah Coal and Coke Company for the purpose of interfering with the employees of said company, either by intimidation or the holding of either public or private assemblages upon said property, or in any wise molesting, interfering with or intimidating the employees of the said Monongah Coal and Coke Company so as to induce them to abandon their work in said mines.

And the defendants are further restrained from assembling in the paths, approaches, and roads upon said property leading to and from their homes and residences to the mines, along which the employees of the Monongah Coal and Coke Company are compelled to travel to get to them, or in any way interfering with the employees of said company in passing to and from their work, either by threats, menaces, or intimidation; and the defendants are further restrained from entering the said mines and interfering with the employees in their mining operations within said mines, or assembling upon said property at or near the entrance of said mines.

The purpose and object of this restraining order is to prevent all unlawful combinations and conspiracies and to restrain all the defendants engaged in the promotion of such unlawful combinations and conspiracies from entering upon the property of the Monongah Coal and Coke Company described in this order, and from in any wise interfering with the employees of said company in their mining operation, either within the mines or in passing from their homes to the mines and upon their return to their homes, and from unlawfully inciting persons who are engaged in working the mines from ceasing to work in the mines, or in any wise advising such acts as may result in violations and destruction of the rights of the plaintiff in this property.

The motion for a permanent injunction is set down for hearing at the United States Court room at Wheeling on the 20th day of September, 1897.

This injunction is not to take effect until the plaintiff, or some responsible person for him, shall enter into bond in the sum of \$5,000, conditioned to pay all such costs and damages that will accrue to the defendants by reason of the plaintiff suing out this injunction.

[Signature.]

FORM NO. 28.²¹

AFFIDAVIT FOR PRELIMINARY INJUNCTION IN COPYRIGHT CASE.

United States of America, District of Massachusetts.

On this sixth day of February, A. D. 1896, before me personally appeared David M. Ladd, who, being by me duly sworn, deposes and says that he is one of the complainants in the above entitled action; that he has during the past seven years had personal supervision and direction of the compiling, preparation, revision and transcribing of the manuscript copy of each of the several editions of the "United Mercantile Agency Credit Ratings for the Marble, Granite and Stone Trade;" that during that period his firm has continually had as subscribers, with

²¹ Copied from Ladd v. Oxnard, 75 Fed. Rep. 706.

one or two exceptions, all the leading manufacturers, quarriers, and wholesalers of marble and granite as used for both monumental and building purposes; that his firm and its representatives and agents have repeatedly consulted said subscribers with the aim and purpose in view of securing items of experience that would be of assistance in the revision and correction of said several editions of said Credit Ratings, and that from personal experience he has found it a matter of impossibility and impracticability to secure from said individual subscribers or members of the wholesale trade, information, corrections, or changes or reliability or value to aid him in connection with the revision of said work, except as may have related to the particular customers or patrons of such individuals, or concerns, which would necessarily and naturally be of limited number and a very small minority of all the firms and parties engaged in the various lines in the several states as included in said work. Said deponent further says that he had personal charge and supervision of the first edition of said Credit Ratings, issued in June, 1890, and that neither the compilation of that nor any of the several editions of the same work issued since that date have been or were compiled or revised from town to city directories or trade lists, but that the information and matter contained in said books were secured through special correspondents, agents and representatives in all sections of the United States, and Canada, and from direct correspondence with the retail dealers in marble, granite and stone in the various towns and cities of the entire country; that the original answers to such direct correspondence with dealers, and the revised lists as sent in annually by said representatives, agents and special correspondents, are now on file in the office of said complainants, and, in consequence, that if any instances occur where errors and misprints appear in both complainants' and respondents' books it cannot be explained or excused on the ground that both used the same common sources of information, unless it can be shown that complainants' agents and representatives and special correspondents also acted in the same capacity for said respondents. The deponent further says that he has made a careful comparison between the work issued by his firm in June, 1894, and the respondents' book, and that he finds that clerical errors and misspellings of his own making from the printed cards and letter headings, and pen signatures of various dealers, are reproduced in said respondents' book without change; that the names of the parties who were never engaged in the marble, granite or stone line, but whose names were inserted in Credit Ratings as detectives (or, in other words, for the purpose of enabling said complainants to discover infringements, should any be attempted), are also reproduced in the book of said respondents; that the names of towns correctly inserted in every standard atlas and gazetteer, but misspelled through error by said complainants in their books, also appear with like misspelling in the book of said respondents; that names wrongfully classified under towns of the same name in different states also appear reproduced without correction in said respondents' book, some of which are shown in the lists or tables herewith appearing, and further shown by the several letters and communications on file herewith, marked Exhibits A 1 to Z, inclusive, and numbers 1 to 15, inclusive. The deponent further says that over ten thousand corrections and changes were made on the 1894 edition of Credit Ratings, as revised and issued in June, 1895, while said Blue Book, issued by respondents, in November, 1895, is almost identical with the June 1894 edition of Credit Ratings, issued seventeen months previously by the complainants, except that a few corrections were made in Pennsylvania and one or two other states. The deponent further says that on

the states of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, and Georgia the substance of the 1894 book of Credit Ratings is reproduced in the Blue Book, with only five or six alterations and one addition: while in the 1895 edition of Credit Ratings, issued seven months in advance of the Blue Book, several hundred changes, additions, and discontinuances were made in the same states. The deponent further says that no edition of the Credit Ratings issued to date has contained less than eight thousand changes from the book of the previous year, and that no two editions of Credit Ratings, published in different years, bear such close resemblance or show such uniformity in composition and make-up as do the Blue Book of the respondents and the 1894 Credit Ratings issued by complainants. The deponent further says that each year since 1889 he has personally devoted two-thirds of his entire time, working long hours and frequently evenings in the revision of this work, constantly employing, during that period, three assistants in writing and mailing correspondence and lists for revision. The said deponent further says that, in such comparison of said Blue Book with said Credit Ratings of 1894 as he has been able to make (which has been thorough in the above mentioned states), he finds the similarities given in said lists or tables hereinafter appearing, as to the states of Alabama, Arizona, Arkansas and California, and says that the same similarity appears as to the states of Colorado, Connecticut, Delaware and Georgia; and from his examination of other states the deponent believes that a further specification would be simply to recopy both of said books, except that some changes appear in the states of Pennsylvania and Massachusetts. In the said list or table hereinafter appearing, the deponent has in some instances added, after the word "Note," a few words in explanation, and that the word "Note" and explanation following should not be taken as appearing in either of said books. And the deponent further says that the following are the letters, characters and numerals and their respective significations, as appearing in the said Blue Book and said Credit Ratings: (Here follows a list setting out the similarities in the publications of plaintiff and defendant).

Ending with Wyoming, respondents follow complainants' classification in making up the Canadian provinces, which is not alphabetical as in other publications, but a style original with, and peculiar to, complainants.

DAVID M. LADD.

Sworn to February 6, 1896.

FORM NO. 29.^m

INJUNCTION BOND.

Know all men by these presents that we, Meyers & Levi, Meyer Weill, Michael Frank, and Samuel Friedlander, are held and firmly bound, jointly and severally, unto Solomon Isaacs in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said Solomon [Isaacs, his executors, administrators or assigns, for which payment well and truly to be made we bind

^m Copied from Myers v. Block, 120 U. S. 208.

ourselves, our heirs, executors and administrators firmly by these presents. Sealed with our seals.]

Dated 19th February, 1874.

Whereas the said Meyers & Levi, Meyer Weill, and Michael Frank have presented a petition to the honorable the District Court of the United States for the District of Louisiana, praying for a writ of injunction against the said Solomon Isaacs: Now, the condition of the above obligation is, that we, the above bounden Meyers & Levi, Meyer Weill, and Michael Frank, and _____, will well and truly pay to the said Solomon Isaacs, the defendant in said injunction, all such damages as he may recover against us in case it should be decided that the said writ of injunction was wrongfully issued.

| | |
|------------------------|--------|
| MEYER WEILL. | (Seal) |
| M. FRANK. | (Seal) |
| LEHMAN, GODCHAUX & CO. | (Seal) |
| MEYERS & LEVI. | (Seal) |
| SAMUEL FRIEDLANDER. | (Seal) |

FORM NO. 30.²³

ORDER FOR PRELIMINARY INJUNCTION.

And now, at this day, to wit, at a Circuit Court of the United States for the Eastern District of Virginia, held at Richmond, in said district, this 8th day of October, A. D. 1887.

| | |
|--|--------------|
| J. P. Cooper and others against Morton Marye, Auditor, etc., and Others. | } In Equity. |
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This cause came on this day to be heard upon the motion of the complainants for a preliminary injunction and was argued by counsel; upon consideration where if it is adjudged, ordered and decreed,²⁴ for reasons stated in writing and made part of the record, that the injunction be issued as prayed in the bill and remain in force until the further order of the court.

HUGH L. BOND,
Circuit Judge.

FORM NO. 31.²⁵

ORDER FOR PRELIMINARY INJUNCTION AGAINST PICKETING, ETC.

[Title of court and cause, etc., see Form No. 30, *supra*.]

This cause came on to be heard upon the plaintiff's motion for a temporary injunction; and after due hearing, at which the several defendants were repre-

²³ Copied from *In re Ayers*, 123 U. S. 455.

²⁴ The beginning of orders and decrees is prescribed in Equity Rule 86, *supra*, p. 1692.

²⁵ Copied from *Vegelahn v. Guntner*, 167 Mass. 94.

sented by counsel, it is ordered, adjudged and decreed that an injunction issue *pendente lite* to remain in force until the further order of this court, or of some justice thereof, restraining the respondents and each and every of them, their agents and servants, from interfering with the plaintiff's business by patronizing the sidewalk or street in front or in the vicinity of the premises occupied by him, for the purpose of preventing any person or persons who now are or may hereafter be in his employment, or desirous of entering the same, from entering it, or continuing in it; or by obstructing or interfering with such persons, or any others, in entering or leaving the plaintiff's said premises; or by intimidating, by threats or otherwise, any person or persons, who now are or may hereafter be in the employment of the plaintiff, or desirous of entering the same, from entering it, or continuing in it; or by any scheme or conspiracy among themselves or with others, organized for the purpose of annoying, hindering, interfering with, or preventing any person or persons who now are or may hereafter be in the employment of the plaintiff, or desirous of entering the same, from entering it, or from continuing therein.

[Signature, see Form No. 30, *supra*, p. 1805.]

FORM NO. 32.*

ORDER FOR PRELIMINARY INJUNCTION AND APPOINTMENT OF RECEIVER.

Virginia.

In vacation. Before Hon. D. W. Bolen, Judge of the Fifteenth Judicial Circuit, Sitting During the Indisposition of Hon. John A. Kelly, Judge of the Sixteenth Judicial Circuit.

| | |
|---|----------------|
| Jonas Wilder and als., complainants, v. Virginia, Tennessee & Carolina Steel and Iron Company, defendants. | } In Chancery. |
|---|----------------|

Upon presentation and reading of the bill of complaint, verified by the affidavits of Jonas Wilder, Wm. G. Sheen, John M. Bailey and A. H. Blanchard, the exhibits therewith filed, and the affidavits of John R. Dickey, J. F. Hicks, Jonas Wilder, W. G. Sheen, A. J. Wilcox, J. H. Fleenor, J. L. Burson, F. N. Hash, W. F. Aldrich, A. A. Hobson, V. Keebler, M. J. Drake, John H. Dishner, F. W. Aldrich, John M. Bailey, (Nos. 1, 2, 3, and 4,) J. H. Winston, Jr., and upon motion of complainant for an order for an injunction and the appointment of a receiver upon consideration of all which it is adjudged and ordered that upon the complainants, or some one of them, executing bond with good security before the clerk of the circuit court of Washington county, in the penalty of \$500.00, conditioned according to law, for the payment of all such damages as may be incurred, and all such costs as may be awarded in case this injunction shall be dissolved, an injunction is awarded, according to the prayer of the bill, to be directed unto the Virginia, Tennessee and Carolina Steel and Iron Com-

* Copied from Central Trust Co. v. South Atlantic etc. R. Co. 57 Fed. Rep. 6.

pany, its officers, agents and employees, restraining it and them, and each of them, from collecting any money due it; from selling, mortgaging, removing, interfering with, or in any way disposing of, its property, or creating or incurring any liabilities upon the property of said company. And said injunction also to be directed to the defendants F. W. Huidekoper, John H. Inman, A. H. Bronson, George S. Scott, Nathaniel Thayer, H. C. Fahnestock, George Blodget, W. G. Oakman, N. Baxter, Jr., A. M. Shook, F. D. Carley, E. A. Adams, R. A. Ayers, C. L. James, J. C. Haskell, William P. Clyde, Extine Norton, restraining them, and each of them, from acting or assuming to act as directors of said Virginia, Tennessee and Carolina Steel and Iron Company, and from in any way transacting business in the name of, or in behalf of, the company, and from any interfering with any of the property of the company; also, restraining them from releasing or attempting to release any subscriber to the capital stock of said company from any liability on account of such subscription to the capital stock of said company. And said injunction also to be directed to the Bailey Construction Company, Bristol Land Company, and the South Atlantic and Ohio Railway Company, their agents, officers, or employees, and each and all of them, restraining them, and each of them, from collecting any money, incurring any liabilities, or in any way interfering with the property or business of the South Atlantic and Ohio Railway Company, Bailey Construction Company, Bristol Land Company, until the further order of court or judge in vacation. And as incident to the injunction, and for the purpose of preserving the property affected thereby, and for the purpose of protecting the rights and interests of all parties in interest, it is ordered and decreed that, upon the injunction herein allowed, being perfected, that John M. Bailey be and he is hereby appointed a receiver in this case, and as such receiver will take charge and possession of the property and assets of the Virginia, Tennessee and Carolina Steel and Iron Company, and of the Bailey Construction Company, of the South Atlantic and Ohio Railroad Company, and of the Bristol Land Company, and manage, operate, and control the same, and collect all money due to either of said corporations; and said receiver shall, in the management and operation of said railroad company, employ and appoint all necessary officers, agents and employees, and make and enforce all necessary rules and regulations, and shall keep all necessary and proper accounts of expenses and disbursements in managing and operating said railroad. Said receiver shall, every two weeks, render an account of the disbursements and expenditures, and of his transactions as receiver, which account is to be filed in this cause; and he shall commence, and, as soon as can be done, complete, and file in this cause, an inventory of all property taken possession of by him as such receiver. But before acting as such receiver, the said John M. Bailey shall execute bond, with good security, before the clerk of said circuit court of Washington county, in the penalty of \$10,000, conditioned for the faithful discharge of his duties as such receiver according to law, and according to this order. This order appointing a receiver to remain in force until further order of court or judge in vacation.

D. W. BOLEN,

Judge of the 15th Judicial Circuit of Va.

Enter this Order. To clerk circuit court of Washington county.

D. W. BOLEN,

Judge of the 15th Judicial Circuit of Va.

August 6, 1890.

FORM NO. 33.^m

MASTER'S REPORT OF FORECLOSURE SALE.

United States of America, }
 District of Nebraska. } as.

In the Circuit Court of the United States for the District of Nebraska.

The Northwestern Mutual Life Insurance Company

No. 139 "R." vs. In Equity.

William T. Seaman et al.

Report of Sale.

To the Judges of the Circuit Court of the United States, for the District of Nebraska, in equity sitting:

In pursuance and by virtue of a decretal order of said court, made in the above entitled cause and bearing date from the ninth day of December, 1895, by which it was, among other things, ordered, adjudged, and decreed, that all and singular the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as might be sufficient to raise the amount reported due to the complainant, as therein mentioned, for the principal and interest and the costs in this case, and which might be sold separately without material injury to the persons interested, to be sold at public auction, by or under direction of one of the masters in chancery of said court, at any time after the twenty-ninth day of December, 1895; provided that request for stay of order of sale, as provided by the statutes of Nebraska, was not made within that time; that the said sale be made at the east door of the Douglas county court-house in the city of Omaha, state of Nebraska; that the said master give public notice of the time and place of such sale according to the course and practice of said court, and that the complainant or any of the parties in this case might become the purchaser; that the said master execute a deed or deeds to the purchaser or purchasers of the said mortgaged premises on the said sale; and that the said master, out of the proceeds of the said sale pay the costs of this suit, and pay to said complainant or its solicitor the amount so reported due as aforesaid, together with interest thereon at the rate of seven per cent. per annum from the date of said report, or so much thereof as the purchase money of the mortgaged premises would pay of the same; and that the said master take receipts for the amounts so paid, and file the same with this report; and that he bring the surplus moneys arising from said sale, if any there should be, into court without delay, to abide the further order of the court; and it is further ordered and decreed that if the moneys arising from said sale should be insufficient to pay the amount so reported due to the complainant, with interest and costs and expenses of said sale as aforesaid, that said master specify the amount of such deficiency in his report of said sale.

I, the undersigned, E. S. Dundy, Jr., one of the masters in chancery of said court, do respectfully certify and report, that having been charged by the solicitor for the complainant with the execution of the said decretal order, I advertised said premises to be sold by me at public auction, to the highest bidder, at the

³⁷ Copied from the original papers in the case.

west door of the Douglas county court-house in the city of Omaha, state of Nebraska, on the twentieth day of March, 1897, at ten o'clock in the forenoon of that day; that previous to said sale I called an inquest of two disinterested free-holders, residents of the district of Nebraska, and duly appraised the interest of the said defendant, in the mortgaged premises herein, at its real value in money, in accordance with the statutes of the state of Nebraska, in such case provided, which said appraisement is hereto attached and made a part of this my report: and that previous to said sale I caused notice thereof to be publicly advertised thirty days before said sale, by causing notice of such sale to be printed and published in the Omaha Weekly Bee, one of the newspapers designated by the rules of the court in which legal advertisements should be made, which notice contained a brief description of the said mortgaged premises; a copy of which said published notice with the proper affidavit of publication thereof is annexed and made part of this my report.

And I do further report that on the said twentieth day of March, 1897, the day on which the said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale and exposed said premises for sale at public auction, to the highest bidder; and the said premises were then and there fairly struck off to the Northwestern Mutual Life Insurance Company for the sum of twenty-one thousand three hundred and thirty-four (\$21,334.00) dollars, it being the highest bidder therefor, and that being the highest sum bidden therefor.

And I do further certify and report, that said mortgaged premises did not sell for a sum sufficient to satisfy said decree, interest and costs, together with the costs and expenses of said sale, but there remains a balance due to said complainant under said decree after said sale, amounting to the sum of three hundred forty-five and 64-100 (\$45.64) dollars, as appears by "schedule A" hereto annexed.

And I further certify and report, that the premises so sold as aforesaid were described in said decretal order as follows, viz.: (describing realty).

(Schedule A was here set out in full.)

E. S. DUNDY, Jr.,
Master in Chancery of the Circuit Court of the United
States for the District of Nebraska.

FORM NO. 34.²⁸

**RULE TO SHOW CAUSE AGAINST CONFIRMATION OF FORECLOSURE
SALE.**

The Northwestern Mutual Life Insurance Company }
 139 "R." } Rule to Show Cause.
against }
William T. Seaman et al. }

On motion of the complainant, by Howard Kennedy, Jr., solicitor, it is ordered by the court that said defendants be and they are hereby ruled to show cause, if any they have, by January twenty-eighth next, why the sale made by the master in chancery under the decree herein shall not be ratified and confirmed.

W. D. McHUGH, Judge.

²⁸ This rule was copied from the record in the case.
Eq. Prac. Vol. III.—114.

FORM NO. 35.²⁹

NOTICE OF RULE TO SHOW CAUSE AGAINST CONFIRMATION OF FORECLOSURE SALE.

In the Circuit Court of the United States for the District of Nebraska.

The Northwestern Mutual Life Insurance Company,
Complainant,
against
William T. Seaman, Sarah M. Seaman and Wm. H.
Slocum, Defendants:
} Notice.

To the above named defendants:

You and each of you will take notice that on January 26th, 1897, the Hon. W. D. McHugh, United States District Judge, made an order herein requiring you to show cause by January 28th, 1897, if any there be, why the sale made herein January 25th, 1897, and the master's report of the same, should not be ratified and confirmed.

HOWARD KENNEDY, Jr.,
Solicitor for Complainant.

We hereby acknowledge service of a copy of the foregoing notice this 27th day of January, 1897.

BARTLETT, BALDRIDGE & DE FORD,
Solicitors for Defendants Seaman.
MEIKLE & GAINES,
Solicitors for Defendant Slocum.

FORM NO. 36.³⁰

EXCEPTIONS TO MASTER'S REPORT OF FORECLOSURE SALE.

In the Circuit Court of the United States within and for the District of Nebraska.

The Northwestern Mutual Life Insurance Company, complainant,
against
Frederick Mauss et al., defendants.
} Exceptions to Master's Report.

Exceptions of the defendant Frederick Mauss to the Master's report of sale of the property in controversy in this action, to wit: lot 123 in Nelson's addition to Omaha, according to the plat thereon recorded in book 6, page 434 of the Deed Records of Douglas county, Nebraska.

The defendant Frederick Mauss excepts to the said master's report of sale and to the said master's doing under said decree for that the above described property

²⁹ Copied from the record in the case.

³⁰ Copied from the record in the case.

was appraised for said sale too low and was appraised so low that said appraisement constitutes in law and in fact a fraud upon the rights of this defendant.

The defendant Mauss further excepts to the said report for that the said J. B. Parrott and Charles E. Miller were not and are not disinterested freeholders as the law requires.

Said defendant further excepts to said report that the said E. S. Dundy, Jr., does not certify in the appraisement attached to and a part of said report that the said J. B. Parrott and Charles E. Miller are disinterested freeholders in and residents of said Douglas county.

This defendant further excepts to said report for the reason that in the appraisement attached to and being a part of said report there is deducted from the gross valuation of said property taxes without any warrant of law therefor, and without any legal certificate showing that said taxes are lawfully due and unpaid.

LYSLE I. ABBOTT,
Solicitor for Defendant.

FORM NO. 37.^a

ORDER AND DECREE CONFIRMING REPORT OF FORECLOSURE SALE.

[Title, etc., see Form No. 30, *supra*, p. 1805.]

This cause coming on to be heard upon the report of sale of E. S. Dundy, Jr., Esq., one of the masters of this court, which report was filed on the twenty-fourth day of March, 1897, and upon motion of the defendant William T. Seaman to set aside the appraisement made under the order of sale issued herein February 10th, 1897, and upon the exceptions taken to the said report of sale upon the part of defendant William T. Seaman, and upon the motion of the said defendant William T. Seaman to set aside said sale, and also upon the motion of the complainant to confirm said report of sale and said sale, and the said cause having been argued by counsel and due deliberation had thereon, and the court, on careful examination of the proceedings of said master, being satisfied that the same have been had in all respects in conformity with the law and with the order of the court, it is by the court ordered that the motions of the defendant William T. Seaman, to set aside said appraisement and to set aside sale and the exceptions taken to the said report of sale on the part of defendant William T. Seaman, be and the same are hereby overruled; and it is by the court ordered that the said report of sale and also the said sale be and the same are hereby approved, ratified and confirmed; and it is further ordered that the said E. S. Dundy, Jr., as master in chancery, convey to the purchaser at said sale, by deed in fee simple, the lands and tenements so sold, and a writ of possession is awarded to put said purchaser in possession of said premises; to which rulings and orders of the court the said defendant William T. Seaman excepts.

It is further ordered that said defendant William T. Seaman have thirty days within which to prepare and serve a bill of exceptions.

W. D. McHUGH, Judge.

^a Copied from the original papers in the case.

FORM NO. 28.^a

ANOTHER DECREE CONFIRMING FORECLOSURE SALE.

[Title of court and cause, etc., see Form No. 30, *supra*, p. 1805.]
 Decree confirming sale, and ordering conveyance and possession.

It appearing to the court by the report of Joseph W. Burke, special commissioner to make the sale of the above-stated railway, that he did, on the 14th day of February, 1895, at Gadsden, in Etowah county, state of Alabama, expose for sale the said Chattanooga Southern Railway, with all its rights, properties, appurtenances, and franchises, and that the same was purchased by the reorganization committee of said railway, as the purchasing committee, to wit, H. A. V. Post (chairman), Russell Sage, Thomas H. Hubbard, Henry L. Lamb, and Newman Erb, at and for the price of four hundred thousand dollars, subject, however, as recited in said decree under which said sale was made, to certain preferential liens and claims, and to all and singular the terms and conditions in said decree set forth; and it further appearing that said purchasers have made the payment of fifty thousand dollars, in cash, to said Joseph W. Burke, special commissioner as provided in said decree; and it being shown to the satisfaction of the court that the statements in the report of said special commissioner of the sale of said property are true, and no objections being made to the confirmation of said report: It is therefore considered, ordered, and decreed by the court, on motion of counsel for complainant, Central Trust Company of New York, that the said report of said special commissioner be, and the same is, in all respects confirmed, and the sale made by him on said 14th day of February, 1895, to said H. A. V. Post (chairman), Russell Sage, Thomas H. Hubbard, Henry L. Lamb, and Newman Erb, the purchasing committee, as joint tenants, and not tenants in common, of all and singular the railway, equipment, property, and franchises of the Chattanooga Southern Railway Company, as described in and by the decree of foreclosure entered in this cause on the 18th day of September, 1892, at and for the sum of four hundred thousand dollars (\$400,000), by said purchasing committee bid, be, and the same is in all things ratified, approved, confirmed, and made absolute; subject, however, to all the receiver's debts, preferential claims, and equities reserved, and to all and singular the conditions of purchase as recited in said decree, and the continued right of this court to adjudge and declare what receiver's or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed, or ought to be paid out of such proceeds of sale in preference to the bonds issued under said mortgage, including the claims set up by the intervention of Carter & Rogan and others, or to the holders of certificates issued under the contract exhibited thereto, if hereafter so adjudged by the court. . . . It is further ordered, adjudged, and decreed that the special commissioner, Joseph W. Burke, be, and he is hereby, authorized and directed, on request of said purchasers, to sign, seal, execute, acknowledge, and deliver a proper deed or deeds of conveyance to the said purchasing committee, or their nominee, conveying all and singular the railway, equipment, property, and franchises of the said Chattanooga Southern Railway within the states of Tennessee, Georgia, Alabama, and all property, rights, and franchises that the said Joseph W. Burke, as receiver

^a Copied from Central Trust Co. v. Carter, 78 Fed. Rep. 225.

of said Chattanooga Southern Railway Company, has acquired during the time of his receivership, free from any equity of redemption of the said Chattanooga Southern Railway Company, or any party to this suit, or any one claiming by, under or through the said Chattanooga Southern Railway Company, or any party to this suit. The court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell said property this day confirmed to said purchasers, if they fail or neglect fully to complete such purchase and comply with the orders of this court in respect to full payment and performance of their said bid, or to pay into court, in accordance with such decree of sale, all such sums of money hereafter ordered by this court to be paid into its registry to discharge any and all such debts, liens, or claims as the court may adjudge and decree ought to be paid out of the proceeds of sale in preference to the bonds secured by the mortgage of the Chattanooga Southern Railway Company herein foreclosed.

In open court this 16th March, 1895.

[Judge's Signature.]

FORM NO. 39.*

ANOTHER DECREE CONFIRMING FORECLOSURE SALE.

[Title of court and cause, etc., see Form No. 30, *supra*, p. 1805.]

DECREE CONFIRMING SALE.

And now, on this 4th day of April, 1881, the report of Mathew F. Pleasants, the master heretofore appointed by this court to make sale of the mortgaged premises, having been heretofore duly made and filed, a copy of which report is as follows, to wit, (setting out report); and it appearing to this court, and the court finds the facts so to be, that the thirty days notice to the purchaser and the defendant's solicitors, as required by said decree herein, of the presentation of said report for confirmation of said sale to be made at this time and place, has been duly given; and thereupon said report of sale being now presented to this court by the complainants' solicitors, and motion made by them that the same be confirmed, and the same having been duly considered,—it is hereby ordered that the report of said master of said sale, and said sale, be, and the same are, in all respects confirmed. Thereupon the complainants' solicitors submitted to this court forthwith a draft deed of conveyance from the said master to the purchaser, as provided by the decree herein, which draft deed of conveyance is in the words and figures following, to wit: (Here was set out in full the deed conveying to purchaser a railroad sold under foreclosure).

And, the said deed of conveyance having been duly considered by this court, the same is now, and hereby, settled and approved. It is hereby further ordered, adjudged and decreed that the said master, Mathew F. Pleasants, when and so soon as the balance of said purchase money mentioned in said report of sale shall have been paid as hereinafter provided, shall make, execute and deliver a deed of conveyance in the form aforesaid to the Norfolk and Western Railroad Company, being the name of the corporation designated as purchaser by said Clark, to whom

* Copied from *Duncan v. Atlantic etc. R. Co.* 88 Fed. Rep. 843.

said property was sold, as set forth in said draft deed of conveyance. And it is further ordered that the purchaser, on or before the 3d day of May, 1881, pay the balance of said purchase money over and above the one hundred thousand dollars paid at the time said property was bid off at said sale, as follows, to wit: Five million of dollars thereof into the Union Trust Company, of the city of New York, subject to the order of this court in this cause; and three million two hundred dollars thereof into the Fidelity Insurance, Trust and Safe-Deposit Company of Philadelphia, subject to the order of this court in this cause; and the remainder of said purchase money (except the one hundred thousand dollars now deposited in the Planters' National Bank of Richmond), amounting to three hundred and five thousand dollars, shall be paid by the purchaser into the National Exchange Bank of Norfolk, Virginia, subject to the order of this cause; and the said purchaser shall take duplicate certificates of deposit of said trust companies and of said National Exchange Bank of Norfolk, and deliver the same to the said master, who shall safely keep one set, and deliver the same into this court, and the other set ~~said master shall~~ deliver to the complainants' solicitors. And it is further ordered that upon the delivery as aforesaid of said duplicate certificates to the said master for the whole amount of said purchase money, to wit, for the sum of eight million six hundred and five thousand dollars, less one hundred thousand dollars now deposited in the Planters' National Bank of Richmond, the said master forthwith execute and deliver said deed to the purchaser; and thereupon the possession of the premises and property set out in said decree and report of sale shall vest in the Norfolk and Western Railroad Company, the grantees named by said Clarence H. Clark, who was the highest bidder at said sale, as the corporation to which said conveyance should be made; and the receivers shall thereupon hand over and deliver the said premises and property to the said Norfolk and Western Railroad Company.

HUGH L. BOND, Circuit Judge.
RO. W. HUGHES, District Judge.

Richmond, April 4, 1881.

FORM NO. 46.⁴⁴

DECREE DISTRIBUTING BALANCE AFTER FORECLOSURE SALE.

[Title of court and cause, etc., see Form No. 30, *supra*, p. 1805.]

Decree distributing balance in court after satisfaction of the mortgage debt.

And now, March 18, 1882, this cause came on to be heard on motion for transfer of balance of funds in hands of the receivers February 10, 1881, and the distribution of balance of proceeds of sale of the mortgaged premises; and it appearing by the report of Charles L. Perkins, special master, that the remaining bonds mentioned in the report of M. F. Pleasants and Charles L. Perkins, special mas-

⁴⁴ Copied from *Duncan v. Atlantic etc. R. Co.*, 88 Fed. Rep. 852. As to form of decrees, see *Equity Rule 86, supra*, p. 1892.

ters, filed May 3, 1881, to wit, \$273,550, with interest thereon at the rate of three per cent. from the 3d day of May, 1881, to wit, \$4,445.19, have been paid out of the purchase money heretofore paid into court by the purchaser, under the direction of said Charles L. Perkins, special master, except one bond and certain coupons which are still outstanding; and it also appearing that the purchase of the claim of the state of Virginia secured by the mortgage dated December 22, 1870, by the Norfolk and Western Railroad Company, has been ratified by the general assembly of the said commonwealth; and the Norfolk and Western Railroad Company, claimant of the said funds in the hands of the receivers as purchaser under the terms of the decree and deed of conveyance, and whose right thereto was reserved by the terms of the decree of May 3, 1881, and also as assignee of the claim of the state of Virginia of its claim secured by the mortgage of December 22, 1870, consenting to this decree; and it further appearing that many of the owners of the claims for labor and supplies are resident upon the line of the said Norfolk and Western Railroad, and that said company is the owner by assignment of a majority of the said claims, and is entitled, either as purchaser of mortgaged premises at the sale of February 10, 1881, or as assignee of the claim of the state of Virginia, to the surplus, if any, of the proceeds of sale, and of the net earnings in the hands of the receivers: It is therefore ordered, adjudged and decreed that the balance of the said proceeds of sale, and the funds in the hands of the receivers, including the special deposit of forty-five thousand dollars in the Exchange National Bank of Norfolk, together with all the accretions of interest, be paid over to said Norfolk and Western Railroad Company, upon the special trust, however, that out of the said funds the said Norfolk and Western Railroad Company shall and will pay the principal of mortgage bond No. 2,652, and all outstanding coupons mentioned in the report of Charles L. Perkins and M. F. Pleasant, as special masters, of May 3, 1881, with interest to May 3, 1881, upon presentation, and shall and will also pay to the lawful owners and holders of claims for labor and supplies the principal of said claims, with interest to the 6th day of June, 1876, in full settlement and discharge thereof; and John S. Wise is hereby appointed special master commissioner to superintend the payment of said claims, and his certificate of approval shall be a sufficient warrant for such payment; but in case of dispute as to the validity of a claim which shall be presented, or as to the title of the holder, the same may be brought to the attention of the court summarily by motion, jurisdiction of the cause being hereby specially retained for that purpose, and the surplus, if any, shall be taken and received by the Norfolk and Western Railroad Company on account of its claims as assignee of the commonwealth of Virginia, or of labor and supply claims, or as purchasers. And it is further ordered that the clerk of this court do check upon the Exchange National Bank of Norfolk, in favor of the Norfolk and Western Railroad Company for the sum of two hundred and forty-five thousand two hundred and six 44-100 dollars, upon the Union Trust Company for the sum of twenty-nine thousand nine hundred and twenty-four 37-100 dollars; and that the receivers do pay over to the Norfolk and Western Railroad Company the balance of the funds in their hands after the deduction of the allowance this day made.

HUGH L. BOND, Circuit Judge.
RO. W. HUGHES, District Judge.

Norfolk, March 18, 1882.

FORM NO. 41.^{**}

CONSENT DECREE.

In the Supreme Court of the District of Columbia.

| | |
|--|-------------------------|
| Thomas J. Phelps, Assignee, vs. Augustine R. McDonald and William White. | } In Equity, No. 3,910. |
|--|-------------------------|

This cause came on to be further heard on this 16th day of February, A. D. 1875; and thereupon, and upon consideration thereof, and with the consent of the parties to this suit, and of Charles E. Hovey and William P. Dole, parties complainant in a certain cause in equity in this court, numbered 3,937, against the same defendants, and claiming one-fourth of the award in the proceedings mentioned,

It is, this 16th day of February, A. D. 1875, ordered, adjudged, and decreed—

1. That the restraining orders heretofore made in both said causes are hereby vacated.

2. That the decree made in this cause on the 28th day of December, A. D. 1874, appointing George W. Riggs, Esq., receiver, and granting a provisional injunction, is modified as follows, viz.: That the defendant William White may receive from the agents of the British government the one-half of the net amount of the award in the proceedings mentioned, free and discharged of all claims of the plaintiffs in both the causes above mentioned, to enable the said defendant to pay the expenses incurred by the defendant A. R. McDonald in the prosecution of this claim: which sum of one-half of said award the court finds to be the reasonable expense incident to the prosecution of the said claim by said defendant A. R. McDonald before said mixed commission, exclusive of said claim of Hovey and Dole.

3. That the remaining half the net amount of said award shall be paid to the said George W. Riggs; and it is ordered, adjudged and decreed that the defendants shall execute all such orders, receipts and acquittances necessary to enable the said George W. Riggs to collect the same. And the said George W. Riggs shall hold the said half of the said award subject to the claims, liens, and rights of the said Charles E. Hovey and William P. Dole, and of the plaintiff in this cause, to be determined by the further decree of this court in this cause and in the cause of said Hovey and Dole hereinbefore mentioned. It is further ordered that said receiver be directed to invest the money so placed in his hands in bonds of the United States or in 3 65-100 bonds of the District of Columbia guaranteed by the United States, as he may deem best for the interest of the parties concerned, and that a copy of this decree be filed in the last mentioned cause.

[Signature of Judge.]

^{**} This form is copied from *Hovey v. McDonald*, 109 U. S. 152.

FORM NO. 42.^{**}

DECREE FOR INJUNCTION AND ACCOUNTING IN PATENT CASE.

At a term of the Circuit Court of the United States for the Northern District of New York, held at the court-house in the village of Canandaigua, on the 28th day of June, 1853.

Present: The Honorable Samuel Nelson, Nathan K. Hall, Judges.

The Troy Iron and Nail Factory
v.
Erastus Corning, James Horner and John H. Winslow. } In Equity.

The above named, the Troy Iron and Nail Factory, the complainants in the above entitled suit, having duly appealed to the Supreme Court of the United States from that part of the decree made in this suit, which dismissed the bill of complaint herein with cost to be taxed, and the said Supreme Court of the United States having duly heard the said appeal at the December term, 1852, upon the transcript of the record, and having reversed the said decree of the Circuit Court of the United States for the Northern District of New York, with costs, and having ordered, adjudged, and decreed that the said complainants recover against the said defendants three hundred and sixty dollars and forty-two cents for their costs in said Supreme Court and that they have execution therefor: The said Supreme Court having remanded the said cause to the said Circuit Court with instructions to enjoin the defendants perpetually from using the improved machinery with the bending lever for making hook or brad-headed spikes, patented to Henry Burden the 2d September, 1840, and assigned or transferred to the complainants, as set forth in complainants' bill, and to enter a decree in favor of the complainants for the use and profits thereof, upon an account to be stated by a master under the direction of the said Circuit Court, as is prayed for by the said complainants in their bill of complaint, and for such further proceedings to be had thereon, in conformity to the opinion and decree of the said Supreme Court, as to law and justice may appertain, which order, decree, and instructions appear to this court by the mandate of the said Supreme Court:

Now, therefore, on filing the said mandate, and in pursuance thereof, and after hearing Mr. Stevens, for the said complainants, and Messrs. Seymour and Seward, for the defendants, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, and in obedience to the said mandate, doth order, adjudge, and decree, that the instrument in writing, bearing date the 14th day of October, 1845, stated and set forth in the pleadings in this cause executed by the said Henry Burden and the said defendants, did not, in legal effect or otherwise, or by just construction, license, impart, authorize, or convey a right to the said defendants to use the said improvements in the manufacture of the hook-headed spikes, by the machinery mentioned in the said bill of com-

^{**}This form is copied from Corning v. Troy Iron and Nail Factory, 15 How. (U. S.) 455.

plaint, or any rights secured to the said Henry Burden by the said letters-patent, and assigned or transferred to the said complainants, as aforesaid.

And it is further adjudged and decreed, that the said defendants have infringed and violated the said patent, so granted to the said Henry Burden, as aforesaid, by making and vending the said hook-headed spikes by the said machinery patented to the said Burden on 2d September, as aforesaid.

And it is further adjudged and decreed, that the said defendants do account to the said complainants for the damages or use and profits, in consequence of the said infringements by the said defendants.

And it is further adjudged and decreed, that an account of the damages, or use and profits, be taken and stated by Marcus T. Reynolds, Esq., counsellor at law, as master of this court, *pro hac vice*, and that the defendants attend before the said master, from time to time, under the direction of the said master, and that the said complainants may examine the said defendants under oath as to the several matters pending on the trial reference, and that the said defendants produce before the said master, upon oath, all such deeds, books, papers, and writings, as the said master shall direct, in their custody or under their control, relating to said matters, which shall be pending before said master.

And it is further ordered and decreed, that a perpetual injunction issue out of and under the seal of this court, against the said defendants, commanding them, their attorneys, agents, and workmen to desist and refrain from making, using, or vending any machine containing the new and useful improvement for which letters-patent were granted to the said Henry Burden on the second day of September, 1840, and from in any manner infringing or violating any of the rights or privileges granted or secured by said patent.

And it is further ordered, that the said complainants recover of the said defendants the damages or use and profits which shall be reported by the said master, and that upon the confirmation of his report [a] decree be entered against the defendants therefor, and also for the costs of the complainants in this suit in this court, and that the said complainants have execution therefor and for the costs in the said Supreme Court.

And it is further ordered and decreed, that such other proceedings be had herein, in conformity to the opinion of the said Supreme Court, as to law and justice may appertain, and that the parties and master may apply, upon due notice, to this court, upon the foot of this decree, for such other and further orders, instructions, and directions, as may be necessary.

A. A. BOYCE,
Clerk.

FORM NO. 43.^a

DECREE FOR PERMANENT INJUNCTION IN COPYRIGHT CASE.

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the United States Circuit Court Room, in the

^a Copied from the record in *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618. For other pleadings and proceedings in the same case, see Forms Nos. 3, 12, *supra*, pp. 1773, 1787, and Form No. 45, *infra*, p. 1821.

Post-office Building in the city of New York, in said District, on the sixteenth day of May, 1893.

Present: Hon. William K. Townsend, Judge.
James T. Black, Francis Black, Adam W. Black and
Francis A. Walker, Complainants,
v.
The Henry G. Allen Company, Defendant. } In Equity, No. 4,718.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

I. That the certain copyright herein relating to and being for a certain book entitled "United States, Part III, Political Geography and Statistics," and granted to Francis A. Walker on the thirteenth day of February, 1888, and in the bill of complaint herein mentioned, is a lawful copyright secured and existing under and in pursuance of the statutes of the United States, and good and valid in law, whereby there was secured to and acquired by the said Francis A. Walker, his heirs and assigns, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the said book for the term of twenty-eight years from the time of recording the title thereof, to wit, from the said thirteenth day of February, 1888.

II. That the defendant herein has infringed the said copyright and the rights of the complainants thereunder by reproducing, copying, publishing and selling, and causing to be reproduced, copied, published and sold, without the complainants' consent, copies of said copyrighted book entitled "United States, Part III, Political Geography and Statistics," as part of the twenty-third volume of a certain reprint of a certain book or publication entitled "Encyclopaedia Britannica, Ninth Edition."

III. That an injunction issue herein, perpetually enjoining and restraining defendant herein, The Henry G. Allen Company, its officers, agents, servants and workmen, from in any form or manner, directly or indirectly, reproducing, and from printing and from reprinting and from copying and from in any form or manner, directly or indirectly, offering to reproduce, and from offering to print and from offering to reprint and from offering to copy and from in any manner whatsoever offering to sell any copy or copies whatsoever of said copyrighted book entitled "United States, Part III, Political Geography and Statistics," or any part or parts thereof; and from directly or indirectly, in any form or manner, reproducing, printing, reprinting, completing, copying, executing, finishing, vending, or selling, and from directly or indirectly, in any form or manner, offering to reproduce, print, reprint, complete, copy, execute, finish, vend or sell any copy or copies whatsoever of the book or publication entitled "Encyclopaedia Britannica, Ninth Edition," or any other book or publication which shall contain or consist in part of said copyrighted book entitled "United States, Part III, Political Geography and Statistics." But nothing herein contained shall in any wise prohibit the sale by the said defendant of any book whatsoever published or issued by the owners of said copyright or their representatives.

IV. That the complainants do recover of the defendant the costs and disbursements of this suit.

WM. K. TOWNSEND,
Judge.

FORM NO. 44.⁴⁸DECREE FOR PERMANENT INJUNCTION AGAINST INTERFERENCE
WITH INTERSTATE COMMERCE.

[Title of court and cause, etc., see Form No. 43, *supra*, p. 1818.]

Upon reading the verified bill of complaint in this cause, and hearing Thomas E. Milchrist, district attorney for the United States, thereon, it is ordered, adjudged and decreed that (Here many individual defendants were named) and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing or stopping any of the business of any of the following named railroads (specifically naming the various roads named in the bill,) as common carriers of passengers and freight between or among any States of the United States, and from in any way or manner interfering with, hindering, obstructing or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the states; and from in any manner interfering with, hindering or stopping any trains carrying the mail; and from in any manner interfering with, hindering, obstructing or stopping any engines, cars, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states; and from in any manner interfering with, injuring or destroying any of the property of any of the said railroads engaged in or for the purpose of, or in connection with, interstate commerce or the carriage of the mails of the United States or the transportation of passengers or freight between or among the states; and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce or the transportation of passengers or property between or among the states; and from injuring or destroying any part of the tracks, roadbed or road, or permanent structures of said railroads; and from injuring, destroying, or in any way interfering with any of the signals or switches of any said railroads; and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking, or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States; and from compelling or inducing or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employees of any of said railroads to refuse or fail to perform any of their duties as employees of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among

⁴⁸ Copied from *In re Debs*, 158 U. S. 570.

the states; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force, or violence any of the employees of any of said railroads who are employed by such railroads and engaged in its service in the conduct of interstate business, or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the states, to leave the service of such railroads; and from preventing any person whatever, by threats, intimidation, force or violence from entering the service of any of said railroads and doing the work thereof in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the states; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the states; and from ordering, directing, aiding, assisting, or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid.

And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them and the service upon them respectively of the writ of subpoena herein, and shall be binding upon said defendants, whose names are alleged to be unknown, from and after the service of such writ upon them respectively by the reading of the same to them or by the publication thereof by posting or printing, and after service of subpoena upon any of said defendants named herein shall be binding upon said defendants and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of the entry of such order and the existence of said injunction.

[Signature of Judge.]

FORM NO. 45.^{**}

WRIT OF INJUNCTION IN COPYRIGHT CASE.

The President of the United States of America to The Henry G. Allen Company,
your officers, agents, servants and workmen, Greeting:

Whereas, it has been represented to us in our Circuit Court of the United States for the Southern District of New York, in the Second Circuit, on the part of James T. Black, Francis Black, Adam W. Black and Francis A. Walker, complainants, that they have lately exhibited their bill of complaint in our said Circuit Court of the United States for the Southern District of New York, against you, the said The Henry G. Allen Company, defendant, to be relieved touching the matters therein complained of; and that the certain copyright having relation

^{**} Copied from the record in *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618. For bill and decree in this case see Forms Nos. 3, 43, *supra*, pp. 1773, 1818.

to and being for a certain book entitled "United States, Part III, Political Geography and Statistics," and granted to Francis A. Walker, on the thirteenth day of February, 1888, and in the bill of complaint herein mentioned, is a lawful copyright secured and existing and in pursuance of the statutes of the United States, and good and valid in law, whereby there was secured to and acquired by the said Francis A. Walker, his heirs and assigns, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the said book for the term of twenty-eight years from the time of recording the title thereof, to wit, from the said thirteenth day of February, 1888; and that you, the said The Henry G. Allen Company, defendant herein, have infringed the said copyright and the rights of the complainants thereunder, by reproducing, copying, publishing and selling, and causing to be reproduced, copied, published and sold, without the complainants' consent, copies of said copyrighted book entitled "United States, Part III, Political Geography and Statistics," as part of the twenty-third volume of a certain book or publication entitled "Encyclopaedia Britannica, Ninth Edition."

Now, therefore, we do strictly command and perpetually enjoin you, the said The Henry G. Allen Company, your officers, agents, servants and workmen, under the pains and penalties which may fall upon you and each of you in case of disobedience, that you forthwith and forever hereafter, desist and refrain from in any form or manner, directly or indirectly, offering to reproduce, and from offering to reprint, and from offering to copy and from in any manner whatsoever offering to sell any copy or copies whatsoever of the said copyrighted book entitled "United States, Part III, Political Geography and Statistics," or any part or parts thereof; and from directly or indirectly, in any form or manner, reproducing, printing, reprinting, copying, executing, finishing, vending or selling, and from directly or indirectly, in any form or manner, offering to reproduce, print, reprint, complete, copy, execute, finish, vend or sell, any copies whatsoever of the book or publication entitled "Encyclopaedia Britannica, Ninth Edition," or any other book or publication which shall contain or consist in part of said copyrighted book entitled "United States, Part III, Political Geography and Statistics." But nothing herein contained shall in anywise prohibit the sale by you, the said The Henry G. Allen Company, of any book whatsoever published or issued by the owners of said copyright, or their representatives.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America, at the city of New York, in said Southern District of New York, this nineteenth day of May, in the year of our Lord one thousand eight hundred and ninety-three.

(Seal)
ROWLAND COX,
Complainants' Solicitor.

JOHN A. SHIELDS,
Clerk.

FORM NO. 46.^{**}

WRIT OF ASSISTANCE.

In the Circuit Court of the United States for the District of Nebraska.

*Ætna Life Insurance Company of Hartford,
Connecticut, Complainant,
against
Solomon C. Maple et al., Defendants.*

} In Chancery.

The President of the United States to George H. Thummel, Marshal of the District of Nebraska, Greeting:

Whereas in the above entitled cause it has been made to appear in the United States Circuit Court in and for the district of Nebraska, that after the decree of said court heretofore rendered in the above cause and proceedings taken for the enforcement thereof, the said Ætna Life Insurance Company as complainant and purchaser at the foreclosure sale under said decree is entitled to be put in possession of the following described realty, to wit: (describing realty).

Now, therefore, you, as United States Marshal, for said district of Nebraska, are hereby directed and commanded that you forthwith put the said Ætna Life Insurance Company into possession of the real estate above described and that you cause the defendants in the above entitled cause, their agents, servants and attorneys, forthwith to yield possession of said property in obedience to the decree entered in this cause. Fail not hereof.

Witness, the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, this fourth day of March, 1898, with the seal of the United States Circuit Court in and for the district of Nebraska.

(Seal)

OSCAR B. HILLIS,
Clerk.

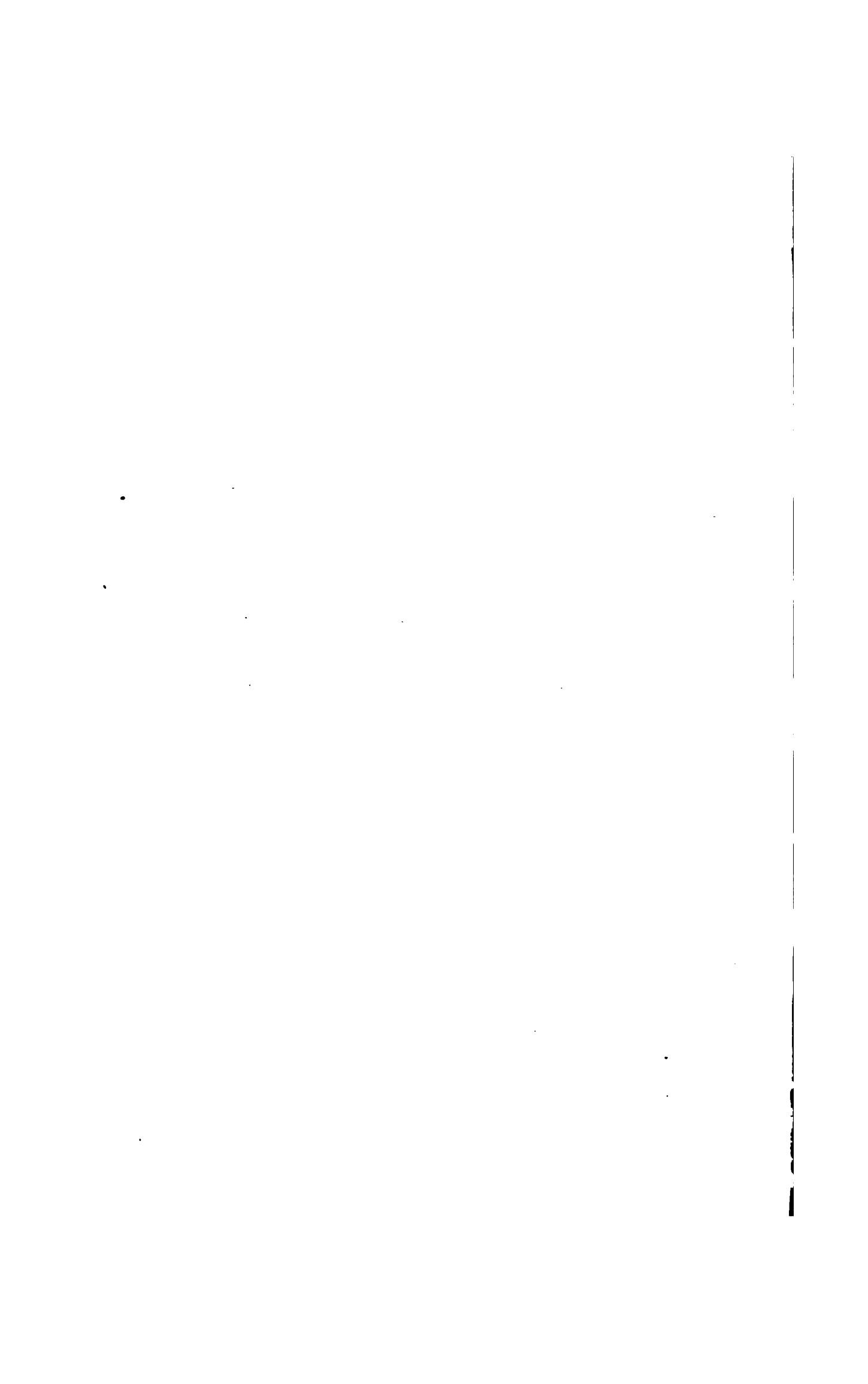


TABLE OF CASES.

[References are to pages.]

A.

| | | | |
|---|------------------------|--|-----------------|
| Abbot v. American Hard Rubber Co. (Fed. Cas. No. 9)..... | 308 | Alabama etc. Co. v. Robinson (56 Fed. 890, 6 C. C. A. 79)..... | 1634 |
| Abercrombie v. Dupuis (1 Cranch 848) | 188, 1901 | v. Robinson (72 Fed. 708, 19 C. C. A. 152) | 1646 |
| Abraham v. North German F. Ins. Co. (8 L.R.A. 188, 37 Fed. 731)..... | 385, 389, 747 | Alabama etc. R. Co. v. Carroll (28 C. C. A. 207, 84 Fed. 780)..... | 222 |
| Accumulator Co. v. Consolidated etc. Co. (53 Fed. 793, 796)..... | 1441 | Alabama Iron etc. Co. v. Anniston L. & T. Co. (57 Fed. 25, 6 C. C. A. 242) | 1597 |
| Acker, In re (66 Fed. 290)..... | 1425, 1501 | Alan v. Jourdon (1 Vern. 161).... | 986 |
| Acme Flexible Clasp Co. v. Cary Mfg. Co. (99 Fed. 500)..... | 1247 | Alexander v. Central R. Co. (8 Dill. 487) | 1626, 1630 |
| Acord v. Western Pocahontas Corp. (156 Fed. 995)..... | 1256, 1271, 1272, 1275 | v. Central R. Co. (Fed. Cas. No. 188) | 1627 |
| Adair v. Thayer (7 Fed. 920)..... | 1245 | v. Mortgage Co. (47 Fed. 181)..... | 1129 |
| Adam v. Folger (56 C. C. A. 540, 120 Fed. 280)..... | 1395 | Alexandra, The (104 Fed. 904)..... | 1050 |
| Adams v. Bridgewater Co. (6 Fed. 179) | 469, 489 | Alger v. Anderson (78 Fed. 729).... | 331 |
| v. Crittenden (106 U. S. 576) | 215 | v. Anderson (92 Fed. 696).... | 57 |
| v. Crittenden (17 Fed. 42)..... | 1845, 1417 | Allan v. Allan (15 Ves. Jr. 130).... | 116 |
| v. Douglas County (Fed. Cas. No. 52) | 205, 1890, 1401, 1405 | Allegheny Oil Co. v. Snyder (45 C. C. A. 604, 106 Fed. 764)..... | 1358 |
| v. Howard (9 Fed. 347)..... | 588, 589 | Allen v. Allen (Fed. Cas. No. 18,223)..... | 641 |
| v. May (27 Fed. 907) | 199 | v. Allen (88 C. C. A. 586, 97 Fed. 525) | 1292 |
| v. Mercantile Trust Co. (15 C. C. A. 1, 66 Fed. 617) | 1469, 1470, 1471, 1497 | v. Blunt (1 Blatchf. 480)..... | 376 |
| Addison v. Duckett (1 Cranch C. C. 349, Fed. Cas. No. 77) | 488 | v. Blunt (8 Story 742)..... | 934 |
| Adoue v. Strahan (97 Fed. 691).... | 40 | v. Blunt (Fed. Cas. No. 216) | 936 |
| Aetna L. Ins. Co. v. Lyon Co. (44 Fed. 329, 82 Fed. 929) | 35, 54 | v. Car Co. (139 U. S. 658)..... | 44 |
| v. Smith (73 Fed. 318) | 50, 269 | v. Consolidated Fruit Jar Co. (145 Fed. 948) | 1205 |
| Aetna Nat. Bank v. U. S. Life Ins. Co. (25 Fed. 531) | 1316, 1825 | v. Dallas etc. R. Co. (3 Woods 316, Fed. Cas. No. 221)..... | 374 |
| Africa v. Knoxville (70 Fed. 729)..... | 1374 | v. Fairbanks (45 Fed. 445)..... | 251 |
| Agnew v. Dorman (Fed. Cas. No. 100)..... | 1205 | v. Jones (79 Fed. 698)..... | 1414 |
| Aheren v. Newton etc. Co. (105 Fed. 702) | 1870 | v. Luke (141 Fed. 694)..... | 112, 244 |
| Ainsworth v. Walmsley (L. R. 1 Eq. 518) | 1208 | v. New York (7 Fed. 483) | 718, 1183, 1235 |
| Akerly v. Vilas (3 Biss. 832, Fed. Cas. No. 120) | 780, 1192 | v. O'Donald (23 Fed. 576)..... | 103 |
| | | v. O'Donald (28 Fed. 17) | 975, 977, 978 |
| | | v. O'Donald (28 Fed. 346) | 221, 1640 |
| | | v. Smith (129 U. S. 465, 9 Sup. Ct. 338) | 1639 |
| | | v. Wilson (21 Fed. 881) | 1235 |
| | | Allen B. Wrisley Co. v. George E. Rouse Soap Co. (90 Fed. 5, 32 C. C. A. 496, dismissing appeal Fed. 589) | 87, 191 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|------------------------|---|------------------|
| Allhusen v. Labouchere (3 Q. B. Div. 654) | 1129 | American Freehold etc. Co. v. Thomas (71 Fed. 782, 18 C. C. A. 327) | 946 |
| Allin, <i>In re</i> (8 Fed. 753) | 1562, 1567 | American Graphophone Co. v. Leeds (140 Fed. 981) | 541 |
| Allington etc. Co. v. Globe Co. (78 Fed. 394) | 1018 | v. National Phonograph Co. (127 Fed. 349) | 77, 114, 115 |
| Allington etc. Mfg. Co. v. Booth (76 Fed. 878, 24 C. C. A. 378) | 1372 | v. Walcutt (86 Fed. 468) | 1444 |
| Allis, <i>In re</i> (44 Fed. 216) | 1021, 1110 | American Lighting Co. v. Public Service Corp. (134 Fed. 129) | 1446 |
| Allis v. Insurance Co. (97 U. S. 144) 64, 79 | | American Loan etc. Co. v. Central Vermont R. Co. (86 Fed. 890) | 1468 |
| v. Jones (45 Fed. 148) | 144 | v. East etc. R. Co. (40 Fed. 384) 464, 470 | |
| v. Stowell (85 Fed. 481) | 1249, 1250 | v. East etc. R. Co. (50 Fed. 384) | 471 |
| Allis-Chalmers Co. v. Iron Molders' Union (150 Fed. 155) | 1389, 1449 | American L. & T. Co. v. Central Vermont R. Co. (84 Fed. 917) | 1546 |
| Allison v. Chapman (19 Fed. 488) | 9 | v. Union Depot Co. (80 Fed. 36) 1628, 1632, 1634, 1652 | |
| v. Corson (88 Fed. 581, 32 C. C. A. 12) | 1367, 1373, 1375, 1396 | American Ore etc. Co. v. Atlas Cement Co. (110 Fed. 53) | 114 |
| Alma First Nat. Bank v. Moore (48 Fed. 799) | 253 | American Paper Barrel Co. v. Laraway (28 Fed. 141) | 1360, 1361 |
| Amberg File etc. Co. v. Shea (78 Fed. Fed. 479, 27 C. C. A. 246, 82 Fed. 814) | 259 | American Preservers' Co. v. Norris (43 Fed. 711) | 1371 |
| Amelia Milling Co. v. Tennessee Coal etc. Co. (123 Fed. 811) | 1371, 1373 | American Steel etc. Co. v. Mayer (123 Fed. 204) | 813 |
| Amendment of May 15, 1893 (149 U. S. 793) | 994 | v. Wire Drawers etc. Union (90 Fed. 806) | 342, 343, 344, |
| Amendment to Rules (144 U. S. 689) | 1036 | 345, 528, 575, 638, 816, 1376, 1428 | |
| American etc. Bank v. First Nat. Bank (27 C. C. A. 274, 82 Fed. 961) | 1053, 1086 | American Sugar-Refining Co. v. Fancher (145 N. Y. 532, 40 N. E. 206, 27 L.R.A. 575) | 35 |
| American etc. Co. v. Leeds (140 Fed. 981) | 531 | v. Johnson (60 Fed. 503, 9 C. C. A. 110) | 197 |
| v. Marquam (62 Fed. 960) | 621 | v. Tatum (60 Fed. 514, 9 C. C. A. 121) | 197 |
| American Bell Tel. Co. v. Western Union Tel. Co. (16 C. C. A. 367, 69 Fed. 666, reversing 50 Fed. 662) | 805, 808 | American Surety Co. v. Worcester Cycle Mfg. Co. (114 Fed. 658) | 1654 |
| v. Pan Electric Tel. Co. (28 Fed. 625) | 378 | American Tube Works v. Bridgewater Iron Co. (124 Fed. 782, affirmed 65 C. C. A. 636, 132 Fed. 16) | 720 |
| American Bonding etc. Co. v. Baltimore etc. R. Co. (60 C. C. A. 52, 124 Fed. 806) | 1495, 1618 | American Waterworks etc. Co. v. Home Water Co. (115 Fed. 171) | 12 |
| v. Logansport etc. Gas Co. (95 Fed. 49) | 1416 | American Wringer Co. v. Ionia (76 Fed. 6) | 209 |
| American Box Mach. Co. v. Crosman 57 Fed. 1021 | 147, 152, 1209 | American Zylonite Co. v. Celluloid Mfg. Co. (82 Fed. 809) | 813 |
| American Can Co. v. Williams (153 Fed. 882, 82 C. C. A. 628, 149 Fed. 200, 79 C. C. A. 158) | 1510 | Ames v. Holderbaum (42 Fed. 341) | 393 |
| American Cereal Co. v. Pettijohn Cereal Co. (70 Fed. 276) | 378, 404 | v. Kansas (111 U. S. 449) | 184, 186 |
| American Constr. Co. v. Jacksonville etc. R. Co. (52 Fed. 937) | 1436, 1449, 1498 | v. Union Pac. R. Co. (60 Fed. 674, 62 Fed. 7) | 1514, 1515 |
| American Diamond Drill Co. v. Sullivan Co. (21 Fed. 74) | 1148 | v. Union Pac. R. Co. (60 Fed. 966) | 1528, 1529, 1559 |
| American Fertilizing Co. v. Board of Agriculture (11 L.R.A. 179, 43 Fed. 609) | 213 | Amestoy v. Transit Co. (95 Cal. 314) | 163 |
| American File Co. v. Garrett (110 U. S. 288) | 974 | Amory v. Lawrence (3 Cliff. 523, Fed. Cas. No. 336) | 434, 561 |
| | | Anderson v. Condit (93 Fed. 349, 35 C. C. A. 835) | 1576 |
| | | v. Jackson (Fed. Cas. No. 357) | 176 |

TABLE OF CASES.

1827

[References are to pages.]

| | | | |
|---|--------------------|---|------------------|
| <i>Anderson v. Jacksonville etc. R. Co.</i> | | <i>Armstrong v. Ettlesohn</i> (36 Fed. 209) | 213 |
| (2 Woods 628, Fed. Cas. No. 358) | 819, 824, 825 | <i>v. Savannah Soap Works</i> (53 Fed. 124) | 326 |
| <i>v. Kissam</i> (28 Fed. 900)..... | 1129 | <i>v. Scott</i> (36 Fed. 63)..... | 1539 |
| <i>v. Pilgram</i> (30 S. Car. 502, 4 L.R.A. 205) | 1658 | <i>v. Syracuse Screw Co.</i> (16 Fed. 168) | 289, 290 |
| <i>v. Watt</i> (138 U. S. 684, 11 Sup. Ct. 449)....178, 191, 193, | 228, 317, 656 | <i>v. U. S. (Gilpin 399, Fed. Cas. No. 548)</i> | 1146 |
| <i>Andrae v. Redfield</i> (12 Blatchf. 407) 1366 | | <i>Arnold v. Chesebrough</i> (35 Fed. 16) 1021 | |
| <i>Andrews v. Cole</i> (20 Fed. 410)..... | 951 | <i>v. Kearney</i> (29 Fed. 820).... | 1089 |
| <i>v. Connolly</i> (145 Fed. 48)..... | 1167 | <i>Arrowmith v. Gleason</i> (129 U. S. 88) 14, 30, 1290 | |
| <i>v. Love</i> (46 Kan. 264)..... | 1341 | <i>Ashley v. Presque Isle County</i> (60 Fed. 56, 8 C. C. A. 455).... 194, 541 | |
| <i>v. National etc. Works</i> (76 Fed. 186, 36 L.R.A. 139, 22 C. C. A. 110, 77 Fed. 774, 28 C. C. A. 454, 36 L.R.A. 158)..... | 1629 | <i>v. Supervisors</i> (88 Fed. 584, 27 C. C. A. 585)..... | 221 |
| <i>v. Solomon</i> (Pet. C. C. 356, Fed. Cas. No. 378)..... | 426 | <i>Aspen Min. etc. Co. v. Billings</i> (150 U. S. 31, 14 Sup. Ct. 4)... | |
| <i>v. Spear</i> (4 Dill. 472, Fed. Cas. No. 379) | 793 | 1231, 1251 | |
| <i>Andrews Bros. Co. v. Youngstown Coke Co.</i> (86 Fed. 585, 30 C. C. A. 298, 58 U. S. App. 444)..... | 199 | <i>v. Rucker</i> (28 Fed. 220)..... | 44 |
| <i>Anglo-American Land etc. Co. v. Lombard</i> (132 Fed. 721, 731, 68 C. C. A. 89) | 6 | <i>Assessor v. Osbornes</i> (9 Wall. 574) | 187 |
| <i>Anglo-Florida Phosphate Co. v. Mc-Kibben</i> (65 Fed. 529, 18 C. C. A. 36) | 757 | <i>Atchison etc. R. Co. v. Gee</i> (189 Fed. 582) | 1444 |
| <i>Animarium Co. v. Neiman</i> (98 Fed. 14) | 258, 259 | <i>v. Osborn</i> (148 Fed. 606, 610, 78 C. C. A. 378)..... | 1483, |
| <i>Anonymous</i> (Fed. Cas. No. 434).... | 797 | 1484, 1532, 1577, 1585 | |
| (2 Atk. 147)..... | 1198 | <i>Atherton etc. Co. v. Atwood-Morrison Co.</i> (102 Fed. 949, 956, 48 C. C. A. 72) | 183 |
| (8 Ves. & B. 98)..... | 1011 | <i>Atkins v. Dick</i> (14 Pet. 114)..... | 328 |
| <i>Anthony v. Campbell</i> (112 Fed. 212, 50 C. C. A. 195)..... | 316, 326, 687 | <i>v. Petersburg R. Co. (8 Hughes 807)</i> | 1592 |
| <i>Appleton v. Ecanbert</i> (45 Fed. 281) | 1024 | <i>v. Wabash etc. R. Co.</i> (29 Fed. 161) | 1491, 1492, 1611 |
| <i>v. Marx</i> (62 Fed. 638, 10 C. C. A. 555) | 541 | <i>Atkyns v. Wright</i> (14 Ves. Jr. 211) | 1131 |
| <i>Appleton Waterworks Co. v. Central Trust Co.</i> (35 C. C. A. 302, 93 Fed. 286) | 1471, 1486 | <i>Atlanta R. Co. v. Western R. Co.</i> (50 Fed. 790, 1 C. C. A. 676) | 20 |
| <i>Arapahoe Bank v. Bradley</i> (19 C. C. A. 206, 72 Fed. 867)..... | 208, 209 | <i>Atlantic Giant Powder Co. v. Dittmar Mfg. Co.</i> (9 Fed. 816)..... | 1426, |
| <i>Arapahoe County v. Kansas Pac. R. Co.</i> (4 Bill. 277, Fed. Cas. No. 502) | 319, 330, 352 | 1446, 1452 | |
| <i>Arcambel v. Wiseman</i> (8 Dall. 306) | 1414 | <i>Atlantic Trust Co. v. Chapman</i> (76 C. C. A. 396, 145 Fed. 820) 499, 1481, 1606 | |
| <i>Arkansas v. Kansas etc. Co.</i> (96 Fed. 353) | 1399 | <i>v. Woodbridge Canal etc. Co.</i> (79 Fed. 501) | 1467 |
| <i>v. Kansas etc. Coal Co.</i> (183 U. S. 185) | 185 | <i>Atlas Nat. Bank v. Abram French Sons Co.</i> (134 Fed. 746) | 891 |
| <i>Arkansas Southeastern R. Co. v. Union Sawmill Co.</i> (88 C. C. A. 224, 154 Fed. 804) | 318 | <i>Attenborough v. London etc. Dock Co.</i> (13 C. P. D. 450) | 1318 |
| <i>Armengaud v. Couderet</i> (27 Fed. 247) | 582, 590, 599, 606 | <i>Attwood v. Small</i> (6 Cl. & F. 232) | 986 |
| <i>Armstrong v. Chemical Nat. Bank</i> (37 Fed. 466) | 464, 621, 640 | <i>Atty.-Gen. v. Brewers' Co.</i> (1 P. Wms. 376) | 1218 |
| | | <i>v. Kerr</i> (4 Beav. 297) | 1218 |
| | | <i>v. Moliter</i> (26 Mich. 444) | 85 |
| | | <i>v. Old South Soc.</i> (18 Allen 474) | 1218 |
| | | <i>v. Rumford Chemical Works</i> (32 Fed. 608) | 85, 85 |
| | | <i>Atwill v. Ferrett</i> (2 Blatchf. 39) 560, 570 | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|---|----------|---|------------|
| Atwill v. Ferrett (Fed. Cas. No. 640) | 572 | Ball v. Tompkins (41 Fed. 486).... | 16 |
| Auer v. Lombard (19 C. C. A. 72, 72 Fed. 209) | 816, 817 | Ballard v. McCluskey (52 Fed. 677) 1030 | |
| Austin v. Chambers (6 Cl. & F. 1)... | 127 | Baltimore, The (8 Wall. 377) | 1190 |
| v. Riley (55 Fed. 833)....950, | 954 | Baltimore etc. Co. v. Freeman (112 Fed. 237, 50 C. C. A. 211)....410, 1560 | |
| v. U. S. (155 U. S. 430)..... | 297 | Baltimore etc. R. Co. v. Adams Ex- press Co. (22 Fed. 404)... | |
| Auten v. City Electric etc. R. Co. (104 Fed. 895) | 1495 | 199, 272 | |
| Averill v. Southern R. Co. (75 Fed. 736) | 323 | v. Burris (50 C. C. A. 48, 111 Fed. 882) | 1618 |
| Avery v. Wilson (20 Fed. 856) | 1193 | v. McLaughlin (19 C. C. A. 551, 73 Fed. 519) ...188, 197, 668 | |
| A. W. Sprague Mfg. Co. v. Hoyt (29 Fed. 421) | 72 | v. Wabash R. Co. (57 C. C. A. 322, 118 Fed. 678) ...16, 1469 | |
| Ayers, <i>In re</i> (128 U. S. 448)..... | 1446 | Baltimore Bldg. etc. Assoc. v. Al- derson (32 C. C. A. 542, 90 Fed. 142) | 1578 |
| Ayling v. Hull (2 Cliff. 494)..... | 1366 | v. Alderson (39 C. C. A. 609, 99 Fed. 489) ...1455, 1463, 1621 | |
| Ayres v. Carver (17 How. 591)....839, 617, 646 | 350 | Baltimore Third Nat. Bank v. Teal (5 Fed. 503) | 191 |
| v. Wiswall (112 U. S. 187)..... | | Bank v. Labitut (1 Woods 11).... | 1232 |
| B. | | | |
| Bachrack v. Norton (132 U. S. 337) | 184 | Banking Assoc. v. Insurance Assoc. (102 U. S. 121) | 209 |
| Back v. Sierra Nevada Consol. Min. Co. (46 Fed. 673) | 205 | Bank of Commerce v. Central etc. Coke Co. (53 C. C. A. 334, 115 Fed. 878) | 1601 |
| Bacon v. Rives (106 U. S. 99).... | 335 | Banks v. Manchester (123 U. S. 244, 9 Sup. Ct. 36) | 493 |
| Badger v. Badger (2 Wall. 87) ...111, v. Badger (Fed. Cas. No. 718)... | 119 | Barber Asphalt Pav. Co. v. Morris (67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945) | 16 |
| v. McNamara (123 Mass. 117, 120) | 474 | Barclay v. Govers (1 Cranch C. C. 147, Fed. Cas. No. 978) | 300 |
| Bagley v. Yates (8 McLean 485) .. | 1298 | Barcus v. Gates (32 C. C. A. 337, 89 Fed. 783) | 270 |
| Bagnell v. Broderick (13 Pet. 436) .. | 8 | Bardon v. Land etc. Imp. Co. (157 U. S. 827, 15 Sup. Ct. 650).... | 18 |
| Bailey v. Dossier (6 How. 23) ...187, v. Sundberg (1 C. C. A. 387, 49 Fed. 583) | 200 | Barken v. Todd (15 Fed. 265) | 1236 |
| v. Tillinghast (40 C. C. A. 98, 99 Fed. 801) | 70 | Barker v. Stowe (4 B. & A. Pat. Cas. 485, Fed. Cas. No. 995)... | |
| v. Willeford (126 Fed. 803)... | 268 | 1240, 1249 | |
| 1273, 1274 | | v. Wardle (2 Myl. & K. 818) .. | 1218 |
| v. Wright (24 Ark. 73) | 128 | Bark Laurens, The (Abb. Adm. 508) ... | 1298 |
| v. Wright (2 Bond 181, Fed. Cas. No. 749) | 538, 597 | Barnard v. Gibson (7 How. 650) .. | |
| Bailey Washing etc. Co. v. Young (12 Blatchf. 199, Fed. Cas. No. 751) .. | 432 | 1162, 1399 | |
| Baird v. Warwick Mach. Co. (40 Fed. 386) | 1635 | v. Hartford etc. R. Co. (Fed. Cas. No. 1,008) | 648 |
| Baker v. Baker (89 Fed. 673) | 716 | Barnes v. Beloit (19 Wis. 93) | 265 |
| v. Biddle (Fed. Cas. No. 784) .. | 53 | Barney v. Baltimore (6 Wall. 280) 187, 226, 307, 309, 310, 318, 320, 332, 333 | |
| v. Cooper (57 Me. 388) | 1536 | v. Peck (16 Fed. 418) | 258 |
| v. Howell (44 Fed. 113)..... | 210 | Barnitz v. Beverly (163 U. S. 127) .. | 64 |
| v. Whiting (1 Story 218, Fed. Cas. No. 786)....708, 1244, 1246, 1247, 1250 | | Barns v. Omally (Fed. Cas. No. 1,035) | 1203, 1204 |
| Baldwin v. Bernard (Fed. Cas. No. 797) | 786 | Barr v. Plate Glass Co. (57 Fed. 86, 6 C. C. A. 260) | 1204 |
| v. Ely (9 How. 580) | 1199 | Barrell v. Tilton (7 Sup. Ct. 382, 119 U. S. 637) | 290 |
| v. Liverpool etc. Ins. Co. (59 C. C. A. 660, 124 Fed. 206) 1162 | | | |
| v. Wyllie (Fed. Cas. No. 18,228) .. | 398 | | |
| Ball v. Rutland R. Co. (98 Fed. 513) | 298, 205 | | |

TABLE OF CASES.

1829

[References are to pages.]

| | | | |
|---|--------------------------------|--|--------------------------------------|
| Barrett v. Central Bldg. etc. Assoc. (130 Ala. 294, 30 So. 347) | 161 | Bay State Gas Co. v. Rogers (147 Fed. 557)..... | 816, 1535, 1537, 1538, 1554, 1555 |
| v. Doughty (25 N. J. Eq. 379) | 560 | Beach v. Mosgrove (16 Fed. 305) .. | 946, 1268 |
| v. Twin City Power Co. (111 Fed. 45) | 78, 461, 462, 467, 480, 489 | Bean v. Clark (30 Fed. 225)..... | 541 |
| v. Twin City Power Co. (118 Fed. 861, 81 C. C. A. 288, 126 Fed. 302) ..11, 28, 30, | 36 | v. Smith (2 Mason 252, Fed. Cas. No. 1,174)..... | 30 |
| Barrow v. Hunton (99 U. S. 80).... | 14, 15, 1289, 1292 | Beard v. Bowler (2 Bond 13) | 531 |
| Barrow Steamship Co. v. Kane (170 U. S. 100) | 106, 198 | v. Bowler (Fed. Cas. No. 1,180) | 534, 557 |
| Barry v. Edmunds (116 U. S. 550, 6 Sup. Ct. 501) | 200, 210 | v. Burts (95 U. S. 434) ..1256, 1261 | |
| v. Missouri etc. R. Co. (27 Fed. 1) | 316, 351 | Bearden v. Benner (120 Fed. 609) .. | 941 |
| Barstow v. Becket (110 Fed. 826) .. | 1354 | Beasley v. McGrath (2 Sch. & Lef. 34) | 966 |
| Barth v. Clise (12 Wall. 403) | 104 | v. Texas etc. R. Co. (191 U. S. 492, 24 Sup. Ct. 184) .. | 1161 |
| v. Makeever (4 Biss. 206, Fed. Cas. No. 1,069) | 99 | Beatty v. Kurtz (2 Pet. 566) | 388 |
| Bartlett v. Gilliard (8 Russ. 149) .. | 569 | Beaubien v. Beaubien (23 How. 190) .. | 109 |
| Barton v. Barbour (104 U. S. 126) | 1545, 1546 | Beavers v. Richardson (118 Fed. 320) | 673 |
| v. Beatty (28 N. J. Eq. 412) | 1808 | Beck etc. Co. v. Wacker etc. Co. (76 Fed. 10, 22 C. C. A. 11) | 402 |
| Basey v. Gallagher (20 Wall. 670) | 5, 68, 579, 910, | Becker v. Hoke (26 C. C. A. 282, 80 Fed. 973) | 1464 |
| Bass v. Christian Feigenspan (82 Fed. 260) | 670 | Bedellan v. Seaton (Fed. Cas. No. 1,218) | 319 |
| Basset v. U. S. (9 Wall. 38, 41) .. | 1282 | Bedford Quarries Co. v. Thomlinson (95 Fed. 208, 36 C. C. A. 272) .. | 15 |
| Batchelder etc. Co. v. Whitmore (122 Fed. 355, 58 C. C. A. 517) | 3 | Beebe v. Russell (19 How. 283) | 1158, 1162 |
| Bate Refrigerating Co. v. Gillett (24 Fed. 696) | 1436 | Beebees Exp. (2 Wall. Jr. 127, Fed. Cas. No. 1,220) | 1051 |
| v. Gillett (30 Fed. 683) | 1426 | Beech v. Haynes (1 Tenn. Ch. 569) | |
| v. Gillett (31 Fed. 808, 815, reversed 128 U. S. 151, 9 Sup. Ct. 225) | 100 | 970, 982, 988, 988 | |
| v. Gillette (28 Fed. 673) | 848, 862, 871, 872, 1021 | Beecher, <i>In re</i> (19 N. Y. Supp. 971) .. | 1539 |
| Bath's Case (3 Ch. Cas. 123) | 986 | v. Bininger (7 Blatchf. 170, Fed. Cas. No. 1,222) | 1450 |
| Batt v. Procter (45 Fed. 515) | 391, 394, 395 | Beekman v. Hudson River West Shore R. Co. (35 Fed. 8) | |
| Batten v. Silliman (3 Wall. Jr. 124) .. | 1366 | 554, 569, 1626, 1627 | |
| Battle v. Atkinson (115 Fed. 384) | 209, 217 | Beers v. Arkansas (20 How. 529) | |
| v. Mutual L. Ins. Co. (Fed. Cas. No. 1,109) | 677 | 297, 298 | |
| Bausman v. Denny (73 Fed. 69) | 1550 | v. Haughton (9 Pet. 829, 380) .. | 69 |
| v. Kinnear (79 Fed. 172, 24 C. C. A. 473) | 456 | Bein v. Heath (6 How. 228) ..288, | 289 |
| Bayerque v. Cohen (Fed. Cas. No. 1,134) | 561 | v. Heath (12 How. 168) ..18, | |
| v. Haley (Fed. Cas. No. 1,135) .. | 192 | 62, 1412 | |
| v. Haley (McAll. 97) | 200 | Belding v. Gaines (37 Fed. 817) .. | |
| v. Jackson Water Co. (McAll. 85, Fed. Cas. No. 1,136) .. | 1173, 1285 | 319, 326, 334 | |
| Bayley v. Adams (6 Ves. Jr. 586) .. | 598 | Belknap v. Schild (161 U. S. 16) .. | 297 |
| Bayue v. Brewer Pottery Co. (82 Fed. 391) | 1494, 1554, 1611 | Bell v. Chapman (10 Johns. 183) .. | 282 |
| | | v. Donohoe (8 Sawy. 435) .. | 322 |
| | | v. Morrison (1 Pet. 351) .. | |
| | | 1053, 1078, 1091 | |
| | | v. Ohio L. etc. Co. (1 Biss. 260, Fed. Cas. No. 1,260) .. | |
| | | 778, 1467, 1469 | |
| | | v. U. S. Stamping Co. (32 Fed. 549) | 869 |
| | | Bellows v. Sowles (52 Fed. 528) .. | 326 |

TABLE OF CASES

[References are to pages.]

| | | | |
|--|---------------------|--|------------------|
| Belmont Nail Co. v. Columbia Iron etc. Co. (46 Fed. 8)..... | 365 | Bibber-White Co. v. White River etc. R. Co. (53 C. C. A. 282, 115 Fed. 786) | 1162, 1578, 1598 |
| v. Columbia Iron etc. Co. (46 Fed. 330)..... | 821 | v. White River etc. R. Co. (110 Fed. 472) | 1580, 1614 |
| Benbow-Brammer Mfg. Co. v. Simp- son Mfg. Co. (132 Fed. 614).... | 1360, 1369 | Bickford v. McComb (88 Fed. 428).. | 326 |
| Bendey v. Townsend (109 U. S. 668)..... | 64 | Bidwell v. Toledo Consol. St. R. Co. (72 Fed. 10) | 402 |
| Benedict v. Railroad Co. (19 Fed. 173) | 64 | Bienvenue Water-Supply Co. v. Mobile (175 U. S. 109, 20 Sup. Ct. 40)... | 181 |
| Benjamin v. Cavaroc (2 Woods 168, Fed. Cas. No. 1,300).... | 36, 1626, 1627 | Bigelow v. Chatterton (10 U. S. App. 267, 2 C. C. A. 402, 51 Fed. 614) | 40 |
| v. New Orleans (20 C. C. A. 591, 74 Fed. 417, 71 Fed. 758) | 200, 201 | Bigler v. Waller (14 Wall. 298).... | 308 |
| Bennett v. Butterworth (11 How. 669)..... | 5, 62, 67 | Bill v. New Albany R. Co. (2 Biss. 890) | 1510 |
| v. Hoefner (17 Blatchf. 341).... | 950, 951 | Billings v. Aspen Min. etc. Co. (2 C. C. A. 252, 51 Fed. 338, 3 C. C. A. 69, 52 Fed. 250)..... | 314, 326, 822 |
| Bent v. Hall (56 C. C. A. 246, 119 Fed. 342)..... | 39 | Bills v. Railroad Co. (13 Blatchf. 230) | 62 |
| v. Thompson (138 U. S. 123).... | 67 | Bingham v. Cabot (3 Dall. 382)..... | 188, 191 |
| Bentley v. Phelps (3 Woodb. & M. 403, Fed. Cas. No. 1,382).... | 1242, 1243, 1246 | Binks v. Binks (2 Bligh 593)..... | 713 |
| Benton v. Woolsey (12 Pet. 27).... | 84, | Bird v. Halsey (87 Fed. 671).... | 1045, |
| Bergman v. Inman (91 Fed. 298).... | 86 | 1050, 1089, 1090 | |
| Berkey v. Cornell (90 Fed. 711).... | 213 | Birdsboro Steel etc. Co. v. Kelley (78 C. C. A. 101, 147 Fed. 713).... | 1279, 1287 |
| Berlin v. Jones (1 Woods 638, Fed. Cas. No. 1,343)..... | 273 | Birdseye v. Hellner (26 Fed. 147).... | 546 |
| Berliner Gramophone Co. v. Seaman (118 Fed. 750, 51 C. C. A. 440, 115 Fed. 806, 53 C. C. A. 376).... | 11, 654, 667, 668, | v. Hellner (27 Fed. 280)..... | 545 |
| Bernards v. Stebbins (109 U. S. 341) | | Bisbee v. Evans (17 Fed. 474).... | 366 |
| Bernheim v. Birnbaum (30 Fed. 885) | | Bischoffsheim v. Baltzer (10 Fed. 1) | |
| Berry v. Sawyer (19 Fed. 286).... | 974 | 1018, 1022 | |
| 975, | | v. Brown (20 Fed. 341).... | 1112, |
| Berry v. Seawall (65 Fed. 753, 13 C. C. A. 101)..... | 51 | 1134, 1185 | |
| Berthold v. Hoskins (38 Fed. 772).... | 206 | Bishop v. Averill (76 Fed. 386).... | 203 |
| Berwind v. Canadian Pac. R. Co. (98 Fed. 158)..... | 294 | v. Bishop (18 Ala. 475)..... | 128 |
| Bessette v. W. B. Conkey Co. (194 U. S. 324)..... | 1430 | v. Leonard (123 Fed. 981).... | 581 |
| Besson v. Goodman (147 Fed. 887) 487, 492, 493, | 495 | v. York (118 Fed. 352)..... | 581 |
| Betancourt v. Mutual Reserve etc. Assoc. (101 Fed. 305)..... | 197 | v. York (124 Fed. 959).... | 113 |
| 198 | | Bissell v. Bugbee (Fed. Cas. No. 1,445) | 1661 |
| 199 | | v. Foss (114 U. S. 252, 5 Sup. Ct. 851) | 830 |
| 200 | | v. Heyward (96 U. S. 580).... | 1201 |
| 201 | | Bissell Carpet-Sweeper Co. v. Goshen etc. Co. (19 C. C. A. 25)..... | 1896 |
| 202 | | Bitterman v. Louisville etc. R. Co. (207 U. S. 205)..... | 263 |
| 203 | | Blachly v. Davis (Fed. Cas. No. 1,456) | 502 |
| 204 | | Black v. Allen Co. (42 Fed. 618, 9 L.R.A. 433) | 1352 |
| 205 | | v. Black (74 Fed. 978)..... | 1626 |
| 206 | | v. Jackson (177 U. S. 349).... | 39 |
| 207 | | v. O'Brien (23 Hun 82)..... | 1194 |
| 208 | | v. Reno (59 Fed. 917)..... | 1648 |
| 209 | | Blackburn v. Portland Gold Min. Co. (175 U. S. 571, 20 Sup. Ct. 222) | 180, 206 |
| 210 | | v. Selma etc. R. Co. (2 Flipp. 525) | 197 |
| 211 | | | |
| 212 | | | |
| 213 | | | |
| 214 | | | |
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| 553 | | | |
| | | | |

[References are to pages.]

| | | |
|--|------------------|--|
| Blackburn v. Stannard (Fed. Cas. No. 1,468) | 501, 556 | Blythe v. Hinckley (173 U. S. 501).. 176 v. Hinckley (84 Fed. 228).. 618, 646, 945, 954, 1233 |
| Blacklock v. Small (127 U. S. 96).. | 350, 1206 | v. Hinckley (84 Fed. 246)..... 1290 |
| Blair v. Harrison (57 Fed. 257, 6 C. A. 326)..... | 677 | Blythe Co. v. Blythe (172 U. S. 644) 176 v. Hinckley (49 C. C. A. 647, 111 Fed. 827)..... 1267, 1269 |
| v. St. Louis etc. R. Co. (20 Fed. 348) | 1519 | Boardman v. Jackson (2 Ball & B. 382) |
| v. St. Louis etc. R. Co. (25 Fed. 282) | 1649 | Board of Liquidation v. U. S. (108 Fed. 689, 47 C. C. A. 587)..... 742 |
| v. Silver Peak Mines (84 Fed. 737) | 1639 | Board of Trade v. C. B. Thomson Commission Co. (103 Fed. 902) |
| v. Silver Peak Mines (93 Fed. 382) | 975, 1246 | 1366, 1371 |
| v. Turtle (5 Fed. 394-398).... | 403 | v. Consol. Stock Exch. (121 Fed. 433) |
| Blaisdell v. Stephens (14 Nev. 17) | 257 | 1869 |
| Blake v. McKim (108 U. S. 386) | 322 | v. National Board of Trade (154 Fed. 238) |
| v. Pine Mountain Iron etc. Co. (76 Fed. 624, 22 C. C. A. 480) | 751, 755 | 159, 167 |
| v. Smith (Fed. Cas. No. 1,502) | 1053 | v. O'Dell Commission Co. (115 Fed. 574)..... 26 |
| Blake Crusher Co. v. Ward (1 Am. L. T. N. S. 423, Fed. Cas. No. 1,505) | 170, 786 | Boesch v. Graff (133 U. S. 705).... |
| Bialock v. Equitable L. Assur. Soc. (75 Fed. 48, 21 C. C. A. 208, re- versing 73 Fed. 655) | 10, 54, 279, 654 | 910, 911 |
| Blanche Page, The (18 Blatchf. 1) | 1312 | Bogardus v. Trinity Church (4 Paige 178) |
| Bland v. Fleeman (29 Fed. 669) | 319, 326 | 595 |
| Blandy v. Griffith (Fed. Cas. No. 1,529) | 958 | Bolleau v. Rutlin (2 Exch. 665).... |
| v. Griffith (6 Fisher Pat. Cas. 434, Fed. Cas. No. 1,530) 1273, 1274, 1275, 1277 | 1277 | 984 |
| Bianton v. Chalmers (158 Fed. 907) | 164, 166 | Bolden v. Jensen (69 Fed. 745).... |
| Blease v. Garlington (92 U. S. 1) 992, 996, 997, 1025 | | 70 |
| Blessing v. Copper Works (34 Fed. 753) | 115 | Bonaparte v. Camden etc. R. Co. (Baldw. 217) |
| Blindell v. Hagan (54 Fed. 40) | 1370 | 1366 |
| Bliss v. Anaconda Copper Min. Co. (156 Fed. 309) | 881, 896 | Bond v. Pennsylvania Co. (61 C. C. A. 355, 126 Fed. 749)..... 1420 |
| Block v. Standard Distilling etc. Co. (93 Fed. 978) | 197 | Bondurant v. Watson (103 U. S. 281) 192 |
| Blodgett v. Hobart (18 Vt. 414) | 637 | Bonner v. Terre Haute etc. R. Co. (151 Fed. 985, 81 C. C. A. 476) .. |
| Bloede v. Carter (148 Fed. 127) | 476 | 1411 |
| Blood v. Morrin (140 Fed. 918) | 1051 | Book v. Justice Min. Co. (58 Fed. 827) |
| Bloomfield v. Roy (120 Fed. 502, 56 C. C. A. 652) | 1610 | 623, 633, 1154 |
| Blossom v. Milwaukee R. Co. (1 Wall. 655) | 825 | Boon v. Chiles (8 Pet. 532)..... 328 |
| Blount v. Burrow (1 Ves. Jr. 546) | 969 | Boone, <i>In re</i> (83 Fed. 948)..... 1448 |
| Blount v. Societe Anonyme du Filtre (6 U. S. App. 835, 3 C. C. A. 455, 53 Fed. 98) | 1375, 1409 | v. Chiles (10 Pet. 177) |
| Blue Ridge etc. Co. v. Floyd-Jones (26 Fed. 817) | 479 | 346, 522 |
| Blumenthal v. Craig (81 Fed. 320, 26 C. C. A. 427) | 285 | Boone County v. Burlington etc. Co. (189 U. S. 684, 11 Sup. Ct. 687) .. |
| | | 1291 |
| | | Booth v. Brown (62 Fed. 794) |
| | | 1512, 1513 |
| | | v. Clark (17 How. 822) |
| | | 1456, |
| | | 1485, 1491, 1496, 1498, |
| | | 1510, 1516, 1541 |
| | | v. Lloyd (83 Fed. 598) |
| | | 181 |
| | | Bootle v. Blundell (19 Ves. Jr. 500) 941 |
| | | Borer v. Chapman (119 U. S. 587) .. |
| | | 1178, 1179 |
| | | Börs v. Preston (111 U. S. 252)... |
| | | 203, 204 |
| | | Borthwick v. Evening Post (8 Ch. D. 449) |
| | | 1208 |
| | | Boston etc. Co. v. Montana Ore Co. (188 U. S. 632) |
| | | 182, 183 |
| | | v. Racine (97 Fed. 817) |
| | | 349 |
| | | Boston etc. R. Co. v. Parr (98 Fed. 483) |
| | | 677 |
| | | Boston etc. St. R. Co. v. Bemis Car- Box Co. (38 C. C. A. 661, 98 Fed. 121) |
| | | 1273, 1278, 1279 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|------------------------|--|--|
| Boston Safe-Deposit etc. Co. v. Chamberlain (14 C. C. A. 368, 66 Fed. 847) | 1606, 1608 | Bradford v. Geiss (4 Wash. 518, Fed. Cas. No. 1,768) | 443 |
| Bostwick v. Brinkerhoff (106 U. S. 3, 1 Sup. Ct. 15) | 1162, 1233 | v. Union Bank (18 How. 57) | 624 |
| Boswell v. Otis (9 How. 350) | 372 | Bradley, <i>Ez p.</i> (7 Wall. 364) | 1425 |
| Bosworth v. Hook (23 C. C. A. 404, 77 Fed. 686) | 915 | v. Converse (4 Cliff. 366, Fed. Cas. No. 1,775) | 103, 959 |
| c. St. Louis Terminal etc. Assoc. (174 U. S. 182) | 829, 1508, 1592, 1613, | v. Marine etc. Co. (3 Hughes 26, Fed. Cas. No. 1,789, <i>affirmed</i>) | |
| 1619, 1620 | | 105 U. S. 175) | 1532 |
| Bottomley v. U. S. (1 Story 153) | 1189 | v. Reed (Fed. Cas. No. 1,785) | 1405 |
| Boulton v. Moore (14 Fed. 922) | 1201 | v. Rhines (8 Wall. 393) | 200 |
| Bound v. South Carolina R. Co. (50 Fed. 853) | 1633 | v. Richardson (Fed. Cas. No. 1,786) | 290 |
| Bourke v. Amison (82 Fed. 710) | 372 | Bradshaw v. Miners' Bank (81 Fed. 902, 26 C. C. A. 673) | 747 |
| Bourne v. Goodyear (9 Wall. 811) | 567 | Bradstreet, <i>Ez p.</i> (7 Pet. 634) | 211 |
| Boussmaker, <i>Ez p.</i> (13 Ves. Jr. 71) | 282 | v. Thomas (12 Pet. 59) | 204 |
| Bowden v. Burnham (8 C. C. A. 248, 59 Fed. 752) | 213, 569, 668 | Bradstreet Co. v. Higgins (112 U. S. 227) | 208, 209 |
| Bowdoin College v. Merritt (59 Fed. 6) | 409 | v. Higgins (114 U. S. 262, 5 Sup. Ct. 880) | 1205 |
| v. Merritt (63 Fed. 213) | 221 | Brainard v. Buck (22 Sup. Ct. 458, 184 U. S. 99) | 677 |
| Bowen v. Christian (16 Fed. 729) | 411 | Braman v. Farmers' L. & T. Co. (114 Fed. 18, 51 C. C. A. 644) | |
| c. Needles Nat. Bank (76 Fed. 177) | 1488 | 1511, 1562, 1565, 1606, 1608, 1607, 1608 | |
| Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co. (43 Fed. 391) | 469, 471 | Brammer v. Jones (Fed. Cas. No. 1,806) | 778 |
| Bowers v. Von Schmidt (87 Fed. 298) | 1445 | v. Jones (2 Bond 100) | 1406 |
| Bowker v. Haight etc. Co. (140 Fed. 794) | 326, 822 | Branch v. Macon etc. R. Co. (Fed. Cas. No. 1,808) | 308 |
| v. Haight etc. Co. (146 Fed. 256) | 1025, 1495 | Brande v. Gilchrist (18 Fed. 465) | 640 |
| v. U. S. (186 U. S. 141) | 628, 646 | Brandon v. Cabiness (10 Ala. 155) | 128 |
| Bowling Green etc. Co. v. Virginia etc. Co. (133 Fed. 186) | 1457, 1491 | Brandon Mfg. Co. v. Prime (14 Blatchf. 871, Fed. Cas. No. 1,810) | 570, 631, 687 |
| Bowman v. Chicago etc. R. Co. (115 U. S. 611) | 209 | Brant, <i>In re</i> (96 Fed. 257) | 1474, 1475 |
| v. Patrick (32 Fed. 368) | 1114 | Brassey v. New York etc. R. Co. (19 Fed. 663) | 1615 |
| Boyce v. Grundy (3 Pet. 210) | 28 | Brazoria County v. Youngstown Bridge Co. (25 C. C. A. 306, 80 Fed. 10) | 576 |
| Boyd, <i>Ez p.</i> (105 U. S. 647) | 1119 | Breed v. Glasgow Invest. Co. (92 Fed. 760) | 1525 |
| v. Glucklich (53 C. C. A. 451, 116 Fed. 181) | 1423, 1441, 1442 | Breedlove v. Nicolet (7 Pet. 413) | 780 |
| v. Schneider (65 C. C. A. 209, 181 Fed. 228) | 265, 654 | Bremena, The v. Card (38 Fed. 144) | 70 |
| v. State (19 Neb. 128) | 1341 | Brent v. Venable (3 Cranch C. C. 227, Fed. Cas. No. 1,842) | 484 |
| v. U. S. (116 U. S. 616) | 1425 | Brickill v. New York (55 Fed. 565) | 886 |
| v. Wyley (18 Fed. 355) | 435, 972 | Bridges v. Sheldon (18 Blatchf. 507, 7 Fed. 43) | 871, 891, 892, 896, 911, 912, 1190, 1208 |
| Boyer v. Keller (113 Fed. 580) | 448 | Briggs v. Sperry (95 U. S. 401) | 163, 188, 277 |
| Boyle v. Zacharie (6 Pet. 648) | 31, 62, 1349 | v. French (2 Sumn. 251) | 226 |
| Boynton v. Haggart (57 C. C. A. 301, 120 Fed. 819) | 120 | v. Neal (56 C. C. A. 572, 120 Fed. 227) | 169, 171, 846, 854, 911, 914, 1383, 1458 |
| Bracken v. Rosenthal (151 Fed. 186) | 245, 259 | v. Stroud (58 Fed. 717) | 409, 518, 519 |
| v. Union Pac. R. Co. (5 C. C. A. 548, 56 Fed. 447) | 391 | | |
| Bradford v. Bradford (2 Flipp. 280) | 362 | | |

[References are to pages.]

| | | | | |
|---|--|--|--|------------|
| Brigham v. Luddington (12 Blatchf. 287, Fed. Cas. No. 1,874).... | 398, | Brown v. Cranberry Iron etc. Co. (18 C. C. A. 444, 72 Fed. 97, 13 C. C. A. 66, 65 Fed. 638)..... | 941 | |
| | 1540, 1541 | v. Cranberry Iron etc. Co. (18 C. C. A. 462, 72 Fed. 103)..... | 941 | |
| Brinckerhoff v. Holland Trust Co. (146 Fed. 203)..... | 824, 826, 828 | v. Davis (10 C. C. A. 532, 62 Fed. 519)..... | 110 | |
| Brine v. Insurance Co. (96 U. S. 627)..... | 63, 1653 | v. Deposit Co. (128 U. S. 403, 9 Sup. Ct. 127)..... | 245, 269 | |
| Brinkerhoff v. Brown (6 Johns. Ch. 189)..... | 252, 254 | v. Ellis (103 Fed. 834) .. | 1053, | |
| Brinkley v. Louisville etc. R. Co. (95 Fed. 345)..... | 864, 990 | | 1054, 1091 | |
| Brisenden v. Chamberlain (53 Fed. 307)..... | 1550 | v. Fletcher (140 Fed. 639) .. | 739, 815 | |
| Britton v. Brewster (2 Fed. 160)..... | 1166 | v. Grove (80 Fed. 564, 25 C. C. A. 644) .. | 851, 1630 | |
| Broadis v. Broadis (84 Fed. 951)..... | 743 | v. Guarantee Trust Co. (128 U. S. 403, 9 Sup. Ct. 127) .. | 269 | |
| Brobst v. Brock (10 Wall. 519) .. | 1640 | v. Hitchcock (173 U. S. 478) .. | 26 | |
| Brock v. Northwestern Fuel Co. (130 U. S. 341, 9 Sup. Ct. 552) .. | 198, 200 | v. Keene (8 Pet. 112) .. | 181 | |
| Brockett v. Brockett (2 How. 238)..... | 1236, 1242 | v. King (10 C. C. A. 541, 62 Fed. 529) .. | 883 | |
| | v. Brockett (3 How. 691).... | | | |
| | 896, 898, 999 | v. Lake Superior Iron Co. (184 U. S. 531) .. | 948, 955 | |
| Broderick's Will (21 Wall. 503) .. | 18 | v. Lanyon (78 C. C. A. 528, 148 Fed. 838) .. | 48 | |
| Bronson v. Keokuk (2 Dill. 498)..... | 392, 394 | v. McDonald (67 C. C. A. 59, 133 Fed. 897, 68 L.R.A. 462, reversing 130 Fed. 964) .. | 1120 | |
| | v. La Crosse etc. Co. (Fed. Cas. No. 1,930)..... | 995 | v. Noyes (2 Woodb. & M. 75) .. | 200, 502 |
| | v. La Crosse etc. R. Co. (2 Wall. 288) .. | 427, 685 | v. Pacific Mail Steamship Co. (5 Blatchf. 525, Fed. Cas. No. 2,025) .. | 823 |
| | v. La Crosse etc. R. Co. (2 Black 524) .. | 643, 839, 1161 | v. Pierce (7 Wall. 205) .. | 441, |
| | v. Schulten (104 U. S. 410) .. | 62, 1231, 1232, 1233 | 452, 487, 493, 961 | |
| Brooklyn Base Ball Club v. McGuire (116 Fed. 782) .. | 1871 | v. Safe Deposit Co. (128 U. S. 412) .. | 262 | |
| Brooks v. Bicknell (4 McLean 70, Fed. Cas. No. 1,946)..... | 934, 938 | v. Swann (10 Pet. 497) .. | 1118 | |
| | v. Byam (1 Story 296, Fed. Cas. No. 1,947) .. | 446, 471 | v. Toledo etc. R. Co. (35 Fed. 444) .. | 1528 |
| | v. Byam (2 Story 553) .. | 1205, 1208 | v. White (16 Fed. 900) .. | 1268 |
| | v. Cannon (2 A. K. Marsh. 525) .. | 1099 | v. Worster (113 Fed. 20) .. | 1013, 1064 |
| | v. Laurent (98 Fed. 647, 39 C. C. A. 201) .. | 743, 746 | Browne v. Strode (5 Cranch 303) .. | 334 |
| | v. O'Hara (8 Fed. 529) .. | 1852 | Browning v. Porter (12 Fed. 460) .. | 1414 |
| | v. Phoenix Mut. L. Ins. Co. (16 Blatchf. 182) .. | 1202 | Brownson v. Wallace (4 Blatchf. 465) .. | 288 |
| | v. Railroad Co. (102 U. S. 107) .. | 1282 | Bruce v. Manchester etc. R. Co. (19 Fed. 345) .. | 1467 |
| Brown v. Arnold (131 Fed. 728, 67 C. C. A. 125) .. | 28, 120 | Brule, <i>In re</i> (71 Fed. 948) .. | 1424 | |
| | v. Aspden (14 How. 25) .. | 1282, 1240, 1248, 1258 | Brun v. Mann (151 Fed. 145) .. | 745 |
| | v. Bass (4 Wall. 262) .. | 1582 | Brush v. Condit (20 Fed. 826) .. | 818 |
| | v. Buena Vista Co. (95 U. S. 157) .. | 1291, 1292 | Brush Electric Co. v. Ball Electric Light Co. (43 Fed. 899) .. | 568 |
| | v. Bulkley (14 N. J. Eq. 294) .. | 983 | v. Brush-Swan etc. Co. (43 Fed. 701) .. | 644 |
| | v. Coal Co. (13 C. C. A. 66, 65 Fed. 636) .. | 990 | Bryan v. Kales (134 U. S. 126, 10 Sup. Ct. 435) .. | 120 |
| | v. Cranberry Iron etc. Co. (40 Fed. 849) .. | 940 | v. Kennett (5 Sup. Ct. 407, 113 U. S. 179) .. | 801, 395 |
| | | | Bryant Bros. Co. v. Robinson (79 C. C. A. 259, 149 Fed. 821) .. | 575, |
| | | | 576, 588 | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|---|---|--|
| Buchanan County First Nat. Bank v. Duel Co. (74 Fed. 873) | 554 | Busch v. Jones (184 U. S. 589, re- certing 16 App. Cas. (D. C.) 23) | 29 |
| Buck v. Colbath (3 Wall. 334) | 754, 1469 | Bussey v. Smith (67 Fed. 13) | 217 |
| v. Mason (185 Fed. 304, 68 C. C. A. 148) | 1324, 1325 | Bush, <i>Ez p.</i> (7 Vin. Abr. 74) | 1228 |
| v. Piedmont etc. Ins. Co. (4 Hughes 415, 4 Fed. 849) | 1492 | v. Marshall (6 How. 284) | 1639 |
| Buckeye Engine Co. v. Donau Brewing Co. (47 Fed. 6) | 1459 | v. U. S. (18 Fed. 625) | 749, 1255 |
| Buckhannon etc. R. Co. v. Davis (68 C. C. A. 345, 185 Fed. 707, 131 Fed. 115) | 1547, 1549 | Buskirk v. King (72 Fed. 22, 18 C. C. A. 418) | 1368, 1875 |
| Buerk v. Imhaeuser (8 Fed. 457) | 155, 278, 410, 560, 569 | Busley v. Flint (9 Biss. 204, Fed. Cas. No. 2,168) | 1653 |
| v. Imhaeuser (10 Fed. 808) | 449 | Butchers etc. Co. v. Louisville etc. R. Co. (14 C. C. A. 290, 67 Fed. 35) | 211 |
| v. Imhaeuser (Fed. Cas. No. 2,107a) | 786, 788 | Butler v. Coleman (124 U. S. 721, 8 Sup. Ct. 718) | 1320 |
| Buffington v. Harvey (95 U. S. 99) | 569, 1242, 1256, 1260, 1261, 1365, 1400, 1402, 1417 | Butler Bros. Shoe Co. v. U. S. Huber Co. (136 Fed. 1) | 544 |
| Building etc. Assoc. v. Price (18 Sup. Ct. 251, 169 U. S. 45) | 175, 205, 561 | Butte etc. Min. Co. v. Montana Ore etc. Co. (189 Fed. 848) | 1025, 1083 |
| Bullinger v. Mackey (14 Blatchf. 355, Fed. Cas. No. 2,126) | 486, 495 | Butterworth v. Hill (114 U. S. 128) | 373 |
| Bullock Electric Mfg. Co. v. Crocker Wheeler Co. (121 Fed. 200) | 1101, 1109 | Byers v. McAuley (149 U. S. 608) | 1467 |
| Bunce v. Gallagher (5 Blatchf. 481, Fed. Cas. No. 2,133) | 308, 347, 815 | v. Surget (19 How. 308) | 160 |
| Bunel v. O'Day (125 Fed. 303) | 637 | Byrd v. Badger (McAll. 443) | 18 |
| Bunker v. Stevens (26 Fed. 245) | 1204 | | |
| Bunker Hill etc. Min. Co. v. Shoshone Min. Co. (100 Fed. 504, 47 C. C. A. 200) | 514, 515, 554 | C. | |
| Burford v. Ringgold (Fed. Cas. No. 2,152) | 1402 | Cabaniss v. Reco Min. Co. (54 C. C. A. 190, 116 Fed. 318) | 319, 758, 1353, 1479 |
| Burgess v. Gray (16 How. 62) | 561 | Cable v. U. S. Life Ins. Co. (191 U. S. 288) | 49 |
| Burgford Corp. v. Lenthal (2 Atk. 551) | 1187 | Cabot v. McMaster (61 Fed. 129) | 208 |
| Burke v. Davis (81 Fed. 907, 26 C. C. A. 875) | 879, 915, 1162 | Cadle v. Tracy (Fed. Cas. No. 2,279) | 408 |
| v. Short (79 Fed. 6, 24 C. C. A. 422) | 1658, 1654 | Caesar v. Capell (83 Fed. 403) | 799, 801, 802, 1201, 1638 |
| Burleigh v. Chehalis County (75 Fed. 873) | 1504 | Calhoon v. Ring (1 Cliff. 592, Fed. Cas. No. 2,292) | 961 |
| Burley v. Flint (Fed. Cas. No. 2,168) | 1653 | Cake v. Mohun (184 U. S. 311, 17 Sup. Ct. 100) | 1463, 1516, 1518, 1605, 1606, 1607, 1622 |
| Burlington etc. Bank v. Clinton (106 Fed. 209) | 245 | Caldwell v. Jackson (7 Cranch 276) | 1081 |
| Burnham v. Bowen (111 U. S. 776, 1585, 1592 | | v. Taggart (4 Pet. 190) | 308 |
| v. Rangeley (2 Woodb. & M. 417) | 1205 | v. Walters (Fed. Cas. No. 2,305) | 1402 |
| Burnley v. Jeffersonville (Fed. Cas. No. 2,181) | 570 | Calhoun v. Lanaux (127 U. S. 684, 8 Sup. Ct. 1345) | 1487 |
| Burns v. Rosenstein (135 U. S. 456, 10 Sup. Ct. 817) | 1216 | California v. Southern Pac. R. Co. (157 U. S. 229) | 318, 333 |
| Burpee v. First Nat. Bank (Fed. Cas. No. 2,185, 5 Biss. 405) | 443, 452 | California Oil etc. Co. v. Miller (96 Fed. 12) | 39, 180, 183 |
| Burr v. Kimbark (29 Fed. 428) | 1387 | California Paving Co. v. Moliter (113 U. S. 609, 5 Sup. Ct. 618) | 1441 |
| Burrell v. Hackley (35 Fed. 833) | 534, 546 | Callvada Colonization Co. v. Hays (119 Fed. 202) | 974, 982, 1009 |
| Burton v. Driggs (20 Wall. 125) | 1099 | Calkins v. Bertrand (8 Fed. 755) | 1197 |
| | | Callaghan v. Myers (128 U. S. 619, 9 Sup. Ct. 177) | 909, 911 |
| | | Callahan v. Heeks (90 Fed. 530) | 236 |
| | | Callanan v. Friedman (86 Fed. 538) | 1452 |
| | | v. Friedman (101 Fed. 321) | 1443, 1450 |

[References are to pages.]

| | | | | |
|--|------|------|--|-----------------|
| Calloway v. Dobson (1 Brock. 118, Fed. Cas. No. 2,325)..... | 693, | 695 | Carr v. U. S. (98 U. S. 437)..... | 297 |
| Camden v. Mayhew (129 U. S. 78)..... | 1298 | | Carrick v. Lamar (116 U. S. 428)..... | 25, |
| v. Stuart (144 U. S. 104, 12 Sup. Ct. 585) | 909, | 913 | 25, | 26 |
| Cameron v. Hodges (127 U. S. 822, 8 Sup. Ct. 1154) | 186, | 660 | Carrington v. Brents (Fed. Cas. No. 2,446) | 300 |
| v. M'Roberts (3 Wheat. 591)..... | 318, | 827, | v. Florida R. Co. (9 Blatchf. 488) | 1400 |
| Camp Mfg. Co. v. Parker (121 Fed. 195) | 1257 | | v. Lentz (40 Fed. 18)..... | 1200 |
| Campbell v. Golden Cycle Co. (141 Fed. 610, 73 C. C. A. 260) | 15 | | v. Stimson (1 Curt. C. C. 487, Fed. Cas. No. 2,450)..... | 1078 |
| v. Hubbard (11 Lea 6)..... | 283 | | Carroll v. Erthellier (1 Fed. 688).... | 787 |
| v. James (2 Fed. 338)..... | 346 | | Carson v. Combe (86 Fed. 202, 29 C. C. A. 680) | 1869 |
| v. Jordan (Hempat. 584)..... | 200 | | Carstaedt v. U. S. Corset Co. (Fed. Cas. No. 2,468) | 1452 |
| v. Mackay (1 Myl. & C. 603)..... | 269 | | Carswell v. Farmers' Loan etc. Co. (20 C. C. A. 282, 74 Fed. 88)..... | |
| v. Morrison (7 Paige 157)..... | 1351 | | 1527, 1529 | |
| v. New York (33 Fed. 795)..... | 533 | | Carter v. Carlisle (Fed. Cas. No. 2,474) | 1406 |
| v. New York (35 Fed. 14)..... | 714, | 715 | v. Greenhow (109 U. S. 64)..... | 1143 |
| v. New York (81 Fed. 182)..... | 851 | | v. New Orleans (19 Fed. 659)..... | 824 |
| v. Railroad Co. (1 Woods 376, Fed. Cas. No. 2,366) | 315, | 748 | v. Ruddy (166 U. S. 498)..... | 8 |
| Campbell Printing Press Co. v. Du- plex Printing Press Co. (41 C. C. A. 351, 101 Fed. 282) | 1223 | | Carter Crume Co. v. Peurrung (30 C. C. A. 174, 86 Fed. 489)..... | 282 |
| v. Manhattan etc. R. Co. (48 Fed. 344) | 494, | 498 | Cartersville Light etc. Co. v. Carters- ville (114 Fed. 699)..... | 1368, 1372 |
| Canal Co. v. Gordon (6 Wall. 561) 18, | 325 | | Carver v. Jarvis-Conklin etc. Co. (73 Fed. 9) | 1290 |
| Cannon v. Collins (3 Del. Ch. 132)..... | 128 | | Cary, <i>In re</i> (10 Fed. 622)..... | 1386, |
| Canter v. Insurance Co. (3 Pet. 307) | 1222 | | 1387, 1427 | |
| Capital City etc. Co. v. Des Moines (72 Fed. 829) | 1370 | | Cary v. Domestic Spring-Bed Co. (26 Fed. 38) | 1404 |
| Carey v. Brown (92 U. S. 171)..... | 315, | | v. Herrin (62 Me. 16)..... | 919 |
| v. Houston etc. R. Co. (16 Sup. Ct. 537, 161 U. S. 115)..... | 758, | | Cary Mfg. Co. v. Acme etc. Co. (108 Fed. 873, 48 C. C. A. 118)..... | 1450 |
| v. Houston etc. R. Co. (52 Fed. 671) | 742 | | Cash Carrier Co. v. Martin (18 C. C. A. 234, 71 Fed. 519) | 1285 |
| Carling v. Seymour Lumber Co. (118 Fed. 483, 51 C. C. A. 1)..... | 168 | | Cashman v. Amador etc. Co. (118 U. S. 58) | 223 |
| Carlsbad v. Tibbetts (51 Fed. 855)..... | 154, | 190, | Caskey v. Chenoweth (10 C. C. A. 605, 62 Fed. 712)..... | 408, 408 |
| Carmichael v. Texarkana (94 Fed. 561) | 272 | | Castello v. Castello (14 Fed. 207) | 411 |
| Carneal v. Banks (10 Wheat. 181) 330, | 1162 | | Caster v. Wood (Baldw. 289, Fed. Cas. No. 2,505) | 690, 694 |
| Carnegie v. Hulbert (3 C. C. A. 391, 53 Fed. 10)..... | 199 | | Castle Creek Water Co. v. Aspen (76 C. C. A. 516, 146 Fed. 8) | 28, 41 |
| v. Hulbert (70 Fed. 209, 16 C. C. A. 498) | 668 | | Castner v. Pocahontas Collieries Co. (117 Fed. 184) | 1425 |
| Carnochan v. Christie (11 Wheat. 446) | 620 | | Cates v. Allen (140 U. S. 451, 18 Sup. Ct. 883) | 19, 24, |
| Carpenter v. Benson (4 Sandf. Ch. 496) | 474 | | 42 | |
| v. Longan (18 Wall. 271)..... | 1639 | | Catlett v. Pacific Ins. Co. (Fed. Cas. No. 2,517) | 188, 191 |
| v. Providence etc. Ins. Co. (4 How. 185) | 974 | | Cavendar v. Cavendar (114 U. S. 464, 5 Sup. Ct. 955) | 106, 964 |
| v. Talbot (38 Fed. 587)..... | 1635 | | Cayuga, The (8 C. C. A. 188, 59 Fed. 483) | 911 |
| Carr v. Hilton (1 Curt. C. C. 390) | 111 | | Cecil Nat. Bank v. Thurber (8 C. C. A. 865, 59 Fed. 918) | 817, 1119, 1125 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|---|-------------------------|---|------------------------|
| Cella v. Brown (75 C. C. A. 608, 144 Fed. 742) | 100, 151, 315 | Central Trust Co. v. Continental Trust Co. (30 C. C. A. 235, 86 Fed. 517) | 1528 |
| Celluloid Mfg. Co. v. Arlington Mfg. Co. (34 Fed. 324) | 1877 | v. Denver etc. R. Co. (97 Fed. 239, 38 C. C. A. 143) | 1576 |
| v. Arlington Mfg. Co. (47 Fed. 4) | 1063 | v. East Tennessee etc. R. Co. (90 Fed. 895) | 1558 |
| v. Cellonite Mfg. Co. (40 Fed. 476) | 896, 912 | v. East Tennessee etc. R. Co. (59 Fed. 523) | 1549 |
| v. Chandler (27 Fed. 12) | 1190 | v. East Tennessee etc. R. Co. (69 Fed. 658) | 1655 |
| v. Chrolithium etc. Co. (24 Fed. 585) | 1441 | v. East Tennessee etc. R. Co. (26 C. C. A. 30, 80 Fed. 624) 914, 1576 | |
| v. Russell (35 Fed. 17) | 1021 | v. East Tennessee Land Co. (79 Fed. 19) | 911, 1523 1524 |
| Centerville v. Fidelity Trust etc. Co. (118 Fed. 332, 55 C. C. A. 348) | 12 | v. Georgia etc. R. Co. (83 Fed. 386) | 881 |
| Central etc. Co. v. Farmers' etc. Co. (113 Fed. 405) | 1495, 1559 | v. Grant Locomotive Works (135 U. S. 208, 10 Sup. Ct. 736) 1232, 1266, 1274, 1282 | |
| Central Electric Co. v. Sprague Electric Co. (57 C. C. A. 178, 120 Fed. 925) | 36 | v. McGeorge (151 U. S. 131, 14 Sup. Ct. 286) | 1465 |
| Central Nat. Bank v. Connecticut Mut. L. Ins. Co. (104 U. S. 54) | 487, 503, 521, 575, 944 | v. Madden (70 Fed. 451, 17 C. C. A. 236) | 836, 837, 851 |
| v. Fitzgerald (94 Fed. 16) | 253, 278 | v. Marietta etc. R. Co. (1 C. C. A. 140, 48 Fed. 875) | 1528 |
| v. Hazard (30 Fed. 484) | 1595, 1600 | v. Marietta etc. R. Co. (16 L.R. A. 90, 51 Fed. 15) | 1523 |
| Central Ohio R. Co. v. Thompson (2 Bond. 296, Fed. Cas. No. 2,550) | 55 | v. Marietta etc. R. Co. (75 Fed. 41) | 688, 881 |
| Central R. etc. Co. v. Farmers' Loan etc. Co. (79 Fed. 158) | 1528 | v. Marietta etc. R. Co. (75 Fed. 193, 209, 21 C. C. A. 201) | 1579 |
| v. Farmers' Loan etc. Co. (112 Fed. 81, affirmed 52 C. C. A. 149, 114 Fed. 263) | 326, 820, 829, 835 | v. Peoria etc. Co. (118 Fed. 30, 55 C. C. A. 52) | 1651 |
| v. Farmers' Loan etc. Co. (118 Fed. 405) | 1559 | v. Richmond etc. R. Co. (69 Fed. 761) | 881, 896 |
| v. Macon etc. R. Co. (115 Fed. 926) | 835 | v. St. Louis etc. Co. (41 Fed. 551) | 1289, 1483, 1496 |
| v. Pettus (113 U. S. 116) | 1216, 1224 | v. St. Louis etc. R. Co. (40 Fed. 426) | 1548 |
| Central R. Co. v. Bourbon County (116 U. S. 583) | 1143 | v. St. Louis etc. R. Co. (59 Fed. 385) | 1473 |
| v. Central Trust Co. (133 U. S. 83) | 1648 | v. Sheffield etc. Coal etc. Co. (44 Fed. 526) | 1599 |
| Central Stock Yards Co. v. Louisville etc. Co. (112 Fed. 823) | 1370 | v. South Atlantic etc. R. Co. (57 Fed. 3) | 1467 |
| Central Trust Co. v. Benedict (78 Fed. 198, 24 C. C. A. 58) | 755 | v. Texas etc. R. Co. (28 Fed. 846) | 435, 1630 |
| v. Bridges (57 Fed. 753, 6 C. C. A. 539, 16 U. S. App. 113) | 744, 753, 794 | v. Texas etc. R. Co. (32 Fed. 448) | 913 |
| v. California etc. R. Co. (110 Fed. 70) | 1038, 1653 | v. U. S. Flour Milling Co. (112 Fed. 371) | 1555 |
| v. Carter (78 Fed. 225, 24 C. C. A. 78) | 748, 751 | v. Valley R. Co. (55 Fed. 903) | 1568 |
| v. Chattanooga etc. R. Co. (68 Fed. 685) | 1548 | v. Virginia etc. Steel etc. Co. (55 Fed. 769) | 793, 794 |
| v. Cincinnati etc. R. Co. (58 Fed. 500) | 1608, 1657 | v. Wabash etc. Co. (57 Fed. 441) | 891, 899, 913 |
| v. Clark (81 Fed. 269, 26 C. C. A. 897) | 1575 | v. Wabash etc. R. Co. (23 Fed. 863) | 1476, 1486, 1496, 1636 |
| v. Condon (67 Fed. 84, 14 C. C. A. 814) | 753 | v. Wabash etc. R. Co. (25 Fed. 1) | 1855 |

TABLE OF CASES.

1837

[References are to pages.]

| | | | |
|--|-----------------------------------|--|------------------------------|
| Central Trust Co. v. Wabash etc. R. Co. (26 Fed. 3)..... | 1574, 1575 | Chappell v. Waterworth (155 U. S. 102) | 182, 185 |
| v. Wabash etc. R. Co. (32 Fed. 187) | 1807 | Charles v. Marion (98 Fed. 186)... | 1845, 1866, 1874 |
| v. Wabash etc. R. Co. (34 Fed. 259) | 1528 | Charlotte First Nat. Bank v. Morgan (182 U. S. 141, 10 Sup. Ct. 37) | 231, 409 |
| v. Wabash etc. R. Co. (46 Fed. 156) | 750, 835 | Chase, <i>In re</i> (124 Fed. 753, 59 C. C. A. 629) | 3 |
| v. Wabash etc. R. Co. (50 Fed. 857) | 695, 696 | Chase v. Cannon (47 Fed. 674).... | 246 |
| v. Wabash etc. R. Co. (57 Fed. 441) | 912 | v. Driver (34 C. C. A. 688, 92 Fed. 784) | 1161 |
| v. Wabash etc. R. Co. (182 Fed. 582) | 1451 | v. Roller-Mills Co. (8 C. C. A. 248, 56 Fed. 625)..... | 213 |
| v. Washington County R. Co. (124 Fed. 818)..... | 1649 | Chase Electric etc. Co. v. Columbia etc. Co. (186 Fed. 699)..... | 669 |
| v. Western North Carolina R. Co. (89 Fed. 24, 39 C. C. A. 126, 98 Fed. 489) | 1311 | Chatfield v. Boyle (105 U. S. 231) | 215 |
| v. Worcester Cycle Co. (91 Fed. 212, <i>reversed</i> 93 Fed. 712, 35 C. C. A. 547).... | 1247, 1496, 1634 | Chattanooga First Nat. Bank v. Radford Trust Co. (26 C. C. A. 1, 80 Fed. 569) | 350 |
| v. Worcester Cycle Mfg. Co. (114 Fed. 650) | 1457, 1485, 1505 | Chattanooga Medicine Co. v. Thedford (14 C. C. A. 101, 86 Fed. 544, <i>reversing</i> 49 Fed. 949, 58 Fed. 347) | 627 |
| Chadbourne v. Coe (2 C. C. A. 327, 51 Fed. 470, 45 Fed. 822) | 322, 332, 333 | Chattanooga Terminal R. Co. v. Felton (69 Fed. 278).... | 1378, 1389, 1612 |
| v. Insurance Co. (31 Fed. 625) | 1193 | Chauncey v. Dyke (55 C. C. A. 579, 119 Fed. 21) | 917 |
| Chaffin v. Hull (89 Fed. 887).... | 242, 262 | Cheang-Kee v. U. S. (3 Wall. 320) | 654 |
| v. Hull (49 Fed. 524, 4 C. C. A. 414, 54 Fed. 487)..... | 322 | Cheatham v. Edgefield Mfg Co. (181 Fed. 118) | 51 |
| Chamberlain, <i>Esq.</i> p. (55 Fed. 704) | 1504, 1575 | v. Pearce (89 Tenn. 668)..... | 605 |
| Chamberlin v. Peoria etc. R. Co. (55 C. C. A. 54, 118 Fed. 32) | 575, 1262, 1266, 1269 | Chemical Nat. Bank v. Hartford Deposit Co. (161 U. S. 1)..... | 1486 |
| Chambers v. McDougal (42 Fed. 694) | 1510 | Cheney v. Libby (74 Fed. 52, 20 C. A. 291) | 1201 |
| Champian Constr. v. O'Brien (104 Fed. 930) | 1364 | v. Libby (134 U. S. 68, 10 Sup. Ct. 498) | 1201 |
| v. O'Brien (107 Fed. 383).... | 1448, 1452 | Cherokee Nation v. Georgia (5 Pet. 78) | 1348, 1892 |
| Chandler v. Pomeroy (87 Fed. 262, <i>affirmed</i> 96 Fed. 156, 37 C. C. A. 480) | 911 | v. Hitchcock (187 U. S. 294, 28 Sup. Ct. 115) | 326 |
| v. Siddle (3 Dill. 479)..... | 1542 | v. Southern Kan. R. Co. (135 U. S. 641, 10 Sup. Ct. 965) | 273, 278 |
| Chapin v. Sears (18 Fed. 814)..... | 270 | Chesapeake etc. R. Co. v. Fire Creek etc. Co. (119 Fed. 942)..... | 231 |
| v. Walker (6 Fed. 794).... | 640, 1167 | Chester v. Life Assoc. (4 Fed. 487) | 734, 735, 823 |
| Chapman v. Atlantic Trust Co. (56 C. C. A. 61, 119 Fed. 257) | 1162, 1605 | Chicago etc. Co. v. Dey (35 Fed. 866, 1 L.R.A. 744) | 1360 |
| v. Barney (129 U. S. 677, 9 Sup. Ct. 426) | 190, 654 | v. Ohle (117 U. S. 123, 6 Sup. Ct. 632) | 788 |
| v. Brewer (114 U. S. 158).... | 41 | Chicago etc. R. Co. v. Burlington etc. R. Co. (34 Fed. 481) | 1380 |
| v. School Dist. (Deady 108, Fed. Cas. No. 2,607).... | 462, 463, 464, 465, 466, 502, 617 | v. Chicago Third Nat. Bank (134 U. S. 276).... | 625, 656, 678, 684 |
| v. Turner (1 Atk. 54)..... | 517 | v. Fosdick (106 U. S. 47) | 1626, 1631, 1645, 1647, 1661 |
| v. Yellow Poplar etc. Co. (74 C. A. 831, 148 Fed. 201) | 54, 279, 710 | v. Macomb (2 Fed. 18).... | 135, 188, 468, 572 |
| | | v. Minnesota (134 U. S. 418) | 46 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|---|-------------------------|--|-------------|
| Chicago etc. E. Co. v. New York etc. Co. (24 Fed. 516) | 1380 | Citizens' Bank etc. Co v. Union Min. etc. Co. (106 Fed. 97) | 235 |
| v. Tompkins (176 U. S. 167, 20 Sup. Ct. 336) | 46, 849 | Citizens' St. R. Co. v. City R. Co. (64 Fed. 647) | 180 |
| v. Union Rolling Mill Co. (3 Sup. Ct. 594, 109 U. S. 702) | 810 | City Nat. Bank v. Hunter (152 U. S. 512, 515, 14 Sup. Ct. 675) | 1222, 1223 |
| v. Wellman (143 U. S. 339) | 47 | City R. Co. v. Citizens' St. R. Co. (17 Sup. Ct. 653, 166 U. S. 557) | 180 |
| Chicago Cheese Co. v. Fogg (53 Fed. 72) | 213 | Clafin v. Bennett (51 Fed. 693) | 677 |
| Chicago Deposit Vault Co. v. McNulta (153 U. S. 554, 14 Sup. Ct. 915) | 1521 | v. McDermott (12 Fed. 375) | 746 |
| Chicago Lumber Co. v. Comstock (71 Fed. 447, 18 C. C. A. 207) | 197 | Clapham v. White (8 Ves. Jr. 36) | 1362 |
| Chicago Union Bank v. Kansas City Bank (136 U. S. 223, 10 Sup. Ct. 1013) | 1496 | Clara A. McIntyre, The (94 Fed. 552) | 1517 |
| Chickering v. Chickering (120 Fed. 69, 56 C. C. A. 475) | 1390 | Clare v. National City Bank (Fed. Cas. No. 2,798) | 1193 |
| v. Hatch (1 Story 516, Fed. Cas. No. 2,671) | 870 | Claridge v. Hoare (14 Ves. Jr. 59) | 1129 |
| Childs v. N. B. Carlestein Co. (78 Fed. 86) | 974, | Clark v. Barnard (108 U. S. 447) | 198, 298 |
| Chiles, <i>In re</i> (2 Wall. 157) | 1308, 1449 | v. Beecher (154 U. S. 631) | 1163 |
| Chilman v. Thompson (Walk. (Mich.) 405) | 964 | v. Beecher Mfg. Co. (115 U. S. 79) | 536 |
| Chiriac v. Reinicker (11 Wheat. 280) | 634 | v. Blair (14 Fed. 812) | 1229 |
| Chisholm v. Georgia (2 Dall. 419) | 298 | v. Brown (57 C. C. A. 76, 119 Fed. 130) | 1459, 1464, |
| v. Johnson (84 Fed. 384) | 505, | 1482, 1604, 1607 | |
| v. Johnson (106 Fed. 191) | 243, | v. Central R. etc. Co. (66 Fed. 803, 14 C. C. A. 112) | 1575 |
| Chisolm v. Calnes (121 Fed. 397) | 1389, 1391, 1432, 1433, | v. Hackett (Fed. Cas. No. 2,823) | 974 |
| Chittenden v. Thannhauser (9 Fed. 228) | 886 | v. Killian (103 U. S. 766) | 1268 |
| Christ-College v. Widdrington (2 Vern. 283) | 986 | v. McGhee (31 C. C. A. 321, 87 Fed. 789) | 1504 |
| Christensen Engineering Co. <i>In re</i> (194 U. S. 458) | 1450 | v. National Linseed Oil Co. (105 Fed. 787, 45 C. C. A. 53) | |
| Christensen Engineering Co. v. Westinghouse Air Brake Co. (68 C. C. A. 476, 135 Fed. 774) | 1386, | 1480, 1481 | |
| 1430, 1435, 1437, 1443, 1450, | 1451 | v. Patterson (158 Mass. 388) | 59 |
| Christian v. Atlantic etc. R. Co. (133 U. S. 238) | 324 | v. Reyburn (8 Wall. 318) | 1644 |
| Christmas v. Russell (5 Wall. 303) | 561, | v. Smith (13 Pet. 195) | 17, 18 |
| v. Russell (14 Wall. 69) | 757 | v. Van Riemsdyk (9 Cranch 153) | |
| Church v. Citizens' St. R. Co. (78 Fed. 526) | 274 | 971, 975, 984 | |
| Cliley v. Patten (62 Fed. 498) | 349 | v. White (12 Pet. 178) | 977 |
| Cimolotti Unhairing Co. v. American Fur Refining Co. (158 Fed. 171) | 910, 1412 | v. Wooster (119 U. S. 322, 7 Sup. Ct. 217) | 11, 48 |
| v. Bowsky (113 Fed. 699) | 904 | Clarke v. Central R. etc. Co. (66 Fed. 18) | 1494, 1612 |
| v. Frolloehr (121 Fed. 561) | 1441 | v. Eastern etc. Assoc. (89 Fed. 779) | 1137 |
| Circleville Bank v. Igleshart (6 McLean 568, Fed. Cas. No. 860) | 1812 | v. Eureka County Bank (116 Fed. 534) | 751 |
| Citizens Bank v. Cannon (17 Sup. Ct. 89, 164 U. S. 319) | 206, 215, | v. Mathewson (12 Pet. 164, reversing 2 Sumn. 262, Fed. Cas. No. 2,857) | 731, 749 |
| 1206, 1223 | | v. Threlkeld (Fed. Cas. No. 2,865) | 1240 |
| | | Clay v. Field (138 U. S. 464) | 214, 216 |
| | | Cleage v. Laidley (79 C. C. A. 284, 149 Fed. 353) | 914 |
| | | Cleaver v. Traders' Ins. Co. (40 Fed. 868) | 1192 |
| | | Clement v. Clement (113 Tenn. 40) | 792 |
| | | Clements v. Moore (6 Wall. 299) | |
| | | 434, 485, 497, 977, 985 | |

TABLE OF CASES.

1839

[References are to pages.]

| | | | |
|--|------------------|---|------------------------------------|
| <i>Cleveland v. Cleveland etc. R. Co.</i> | | <i>Cohen v. Gratz</i> (3 Wall. Jr. 379, Fed. Cas. No. 2,963)..... | 937 |
| (98 Fed. 123)..... | 51 | <i>v. Solomon</i> (68 Fed. 411)..... | 1467 |
| <i>v. Cleveland City R. Co.</i> (194 U. S. 517)..... | 47 | <i>v. Virginia</i> (6 Wheat. 406).... | 298 |
| <i>Cleveland First Nat. Bank v. Shedd</i> | | <i>Colron v. Millaudon</i> (19 How. 113)... | 314 |
| (121 U. S. 74, 7 Sup. Ct. 807).... | | <i>Coit v. North Carolina Gold Amalgamated Co.</i> (9 Fed. 577).... | 1135 |
| | 1161, 1646 | <i>v. Sullivan-Kelley Co.</i> (84 Fed. 724) | 273 |
| <i>Cleveland Ins. Co. v. Globe Ins. Co.</i> | | <i>Cole v. Cunningham</i> (133 U. S. 116) 1392 | |
| (98 U. S. 374)..... | 80 | <i>Coleman v. Hudson River Bridge Co.</i> | |
| <i>v. Reed</i> (Fed. Cas. No. 2,889)... | 1639 | (Fed. Cas. No. 2,983).... | 1400 |
| <i>Cleveland Tel. Co. v. Stone</i> (105 Fed. 794) | 326 | <i>v. Martin</i> (6 Blatchf. 291, Fed. Cas. No. 2,986)..... | 1013 |
| <i>Clews v. Woodstock Iron Co.</i> (44 Fed. 31) | 403 | <i>v. Nelli</i> (11 Fed. 461)..... | 1173 |
| <i>Clifton v. Orchard</i> (1 Atk. 610).... | 1189 | <i>Coler v. Board</i> (89 Fed. 257)..... | 80 |
| <i>Clum v. Brewer</i> (2 Curt. 506).... | 1366 | <i>Cole Silver Min. Co. v. Virginia etc. Water Co.</i> (1 Sawy. 470, Fed. Cas. No. 2,989).... | 326, 331, 1379 |
| <i>Clyde v. Richmond etc. R. Co.</i> (55 Fed. 445) | 825 | <i>v. Virginia etc. Water Co.</i> (1 Sawy. 685, Fed. Cas. No. 2,990).... | 325, 326, 334, 373, 1149, 1407 |
| <i>v. Richmond etc. R. Co.</i> (59 Fed. 384) | 888, 909 | <i>Colgate v. Compagnie Française</i> (23 Fed. 82, 23 Blatchf. 88)... | |
| <i>v. Richmond etc. R. Co.</i> (68 Fed. 21)..... | 1574 | 441, 478 | |
| <i>v. Richmond etc. R. Co.</i> (72 Fed. 121, 18 C. C. A. 467)... | 934, 935 | <i>v. Western Union Tel. Co.</i> (19 Fed. 828)..... | 1247 |
| <i>Coates v. Merrick Thread Co.</i> (41 Fed. 73)..... | 1023 | <i>Collins v. Coes</i> (8 Fed. 517)..... | 1245 |
| <i>v. Muse</i> (1 Brock. 529, Fed. Cas. No. 2,916)..... | 893, 1238 | <i>Collins Mfg. Co. v. Ferguson</i> (54 Fed. 721) | 333 |
| <i>Cobb v. Baxter</i> (1 Tenn. Ch. 405)... | 636 | <i>Collinson v. Jackson</i> (14 Fed. 305)... | 659 |
| <i>v. Clough</i> (88 Fed. 604).... | 1352 | <i>Colonial etc. Mortg. Co. v. Hutchinson Mortg. Co.</i> (44 Fed. 219)..... | 334 |
| <i>Coburn v. Cedar Valley etc. Co.</i> (26 Fed. 791) | 1400, 1402, 1406 | <i>Colorado v. Turck</i> (150 U. S. 138)... | 180 |
| <i>v. Cedar Valley Co.</i> (138 U. S. 196, 11 Sup. Ct. 258)... | 624, 708 | <i>Colorado Coal etc. Co. v. U. S.</i> (123 U. S. 307)..... | 85 |
| <i>v. Schroeder</i> (8 Fed. 522)..... | 1193 | <i>Colorado Eastern R. Co. v. Chicago, etc. R. Co.</i> (73 C. C. A. 132, 141 Fed. 898)..... | 1417 |
| <i>v. Schroeder</i> (11 Fed. 425).... | 1244 | <i>Colt v. Colt</i> (111 U. S. 566)..... | 301 |
| <i>Cochran v. Childs</i> (111 Fed. 438)... | 1206 | <i>Columb v. Webster Mfg. Co.</i> (76 Fed. 198) | 364 |
| <i>v. Pittsburg etc. R. Co.</i> (150 Fed. 682)..... | 1635 | <i>Columbian Equipment Co. v. Mercantile etc. Co.</i> (113 Fed. 28, 51 C. C. A. 33)..... | 854 |
| <i>Cochrane v. Deener</i> (94 U. S. 784)... | 927, 928 | <i>Columbus etc. R. Co.'s Appeal</i> (109 Fed. 177, 48 C. C. A. 275).... | 898, 911, 1585, 1601, 1655 |
| <i>Cocke v. Copenhaver</i> (61 C. C. A. 211, 126 Fed. 145)..... | 1286 | <i>Columbus R. Co. v. Patterson</i> (73 C. C. A. 603, 143 Fed. 245)..... | 1091 |
| <i>Coddington v. Pensacola etc. R. Co.</i> (108 U. S. 409)..... | 568 | <i>Combe v. London</i> (15 L. J. Ch. 80)... | 128 |
| <i>Coe v. Louisville etc. R. Co.</i> (3 Fed. 775) | 1380 | <i>Combs v. Hodge</i> (21 How. 404).... | 964 |
| <i>Coeur d'Alene etc. Co. v. Miners' Union</i> (51 Fed. 260, 19 L.R.A. 382) 1404 | | <i>Comer v. Felton</i> (10 C. C. A. 28, 61 Fed. 781) | 1305, 1306, 1308, 1309, 1502, 1549 |
| <i>Comin v. Chattanooga Water etc. Co.</i> (44 Fed. 538)..... | 824 | <i>Comly v. Buchanan</i> (81 Fed. 58)... | |
| <i>v. Haggis</i> (11 Fed. 219)..... | 221 | 1409, 1452 | |
| <i>Coggill v. Lawrence</i> (2 Blatchf. 304) 1202 | | <i>Commercial Acetylene Co. v. Portable Lighting Co.</i> (154 Fed. 642).... | 792 |
| <i>Coghlan v. South Carolina R. Co.</i> (32 Fed. 816)..... | 1201 | | |
| <i>Cohen, In re</i> (186 Fed. 999)... | 1828, 1836 | | |
| <i>Cohen v. Delavina</i> (104 Fed. 946)... | 1859, 1861 | | |
| <i>v. Gold Creek etc. Co.</i> (95 Fed. 580) | 1505, 1540 | | |

TABLE OF CASES.

[References are to pages.]

| | | |
|---|------------|---|
| Commercial etc. Bank <i>v.</i> Corbett (5 Sawy. 172, Fed. Cas. No. 8,067)... | 1477, 1478 | Consolidated Electric Light Co. <i>v.</i> Brush-Swan Electric Light Co. (20 Fed. 502)..... 258 |
| <i>v.</i> Slocomb (14 Pet. 60).... 195, 409 | | Consolidated Fastener Co. <i>v.</i> Colum- bian Button etc. Co. (85 Fed. 54) 871 |
| Commercial Bank <i>v.</i> Sandford (103 Fed. 98) | 620 | Consolidated Fastener Co. <i>v.</i> Traut, etc. Co. (81 Fed. 388)..... 1870 |
| Commonwealth Roofing Co. <i>v.</i> North American Trust Co. (68 C. C. A. 418, 133 Fed. 984).... 1496, 1497, 1506, 1507 | | Consolidated Fruit-Jar Co. <i>v.</i> Strong (Fed. Cas. No. 8,180)..... 948 |
| Commonwealth Title etc. Co. <i>v.</i> Cummings (83 Fed. 767).... 440, 452 | | <i>v.</i> Whitney (Fed. Cas. No. 8,182) 1858, 1871 |
| Compton <i>v.</i> Jesup (167 U. S. 1).... | 754 | Consolidated Retail Booksellers <i>v.</i> Ward (180 Fed. 389)..... 1856 |
| <i>v.</i> Jesup (68 Fed. 263, 15 C. C. A. 397).... 744, 753, 754, 820, 1313 | | Consolidated Roller-Mill Co. <i>v.</i> Coombs (39 Fed. 25)..... 567 |
| Computing Scale Co. <i>v.</i> Moore (139 Fed. 197)..... 520, 527, 528, 532, | 539 | Consolidated Store-Service Co. <i>v.</i> Dettenthaler (93 Fed. 307).... 1181, 1182 |
| Comstock <i>v.</i> Herron (45 Fed. 680, reversed 5 C. C. A. 266, 55 Fed. 803) | 465 | Consolidated Tank-Line Co. <i>v.</i> Kansas City Varnish Co. (43 Fed. 204) 1463 |
| Conard <i>v.</i> Atlantic Ins. Co. (1 Pet. 386) | 502 | Consolidated Water Co. <i>v.</i> Babcock (76 Fed. 248)..... 319, 349 |
| Conery <i>v.</i> Sweeney (81 Fed. 14, 26 C. C. A. 309)..... | 347 | Consolidated Wyoming etc. Co. <i>v.</i> Champion Min. Co. (63 Fed. 540). 248 |
| Confiscation Cases (20 Wall. 107)... | 176 | Continental Ins. Co. <i>v.</i> Rhoads (7 Sup. Ct. 198, 119 U. S. 237).... 176, 189, 192, 660 |
| Conklin <i>v.</i> U. S. Shipbuilding Co. (123 Fed. 913)..... 1464, | 1555 | Continental Nat. Bank <i>v.</i> Buford (191 U. S. 119)..... 176 |
| Conklin <i>v.</i> Wehrman (38 Fed. 874)... | 570 | <i>v.</i> Hellman (66 Fed. 184)..... 1127 |
| Conkling <i>v.</i> Butler (4 Biss. 22, Fed. Cas. No. 3,100)..... 1510, | 1562 | Continental Trust Co. <i>v.</i> Toledo etc. R. Co. (59 Fed. 514).... 1511, 1512, 1513, 1517 |
| Conley <i>v.</i> Nallor (118 U. S. 127).... | 434, | <i>v.</i> Toledo etc. E. Co. (82 Fed. 642) ... 758, 794, 820, 884, 885, 886, 840 |
| Conn <i>v.</i> Penn (5 Wheat. 424).... 308, | 972 | <i>v.</i> Toledo etc. E. Co. (99 Fed. 171) 1236, 1284 |
| Connecticut etc. R. Co. <i>v.</i> Hendee (27 Fed. 678)..... | 992 | <i>v.</i> Toledo etc. E. Co. (99 Fed. 177) 999 |
| Connecticut Mut. etc. Co. <i>v.</i> Union Trust Co. (112 U. S. 250)..... | 806 | Continuous Glass Press Co. <i>v.</i> Schmertz Wire Glass Co. (153 Fed. 577, 82 C. C. A. 587).... 1372, 1396 |
| Connecticut Mut. Ins. Co. <i>v.</i> Cushman (108 U. S. 51)..... | 1009 | Converse <i>v.</i> Michigan Dairy Co. (45 Fed. 18)..... 1155 |
| Connecticut Mut. L. Ins. Co. <i>v.</i> Crawford (21 Fed. 281)... | 68 | Conway <i>v.</i> Taylor (1 Black 603).... 1893 |
| <i>v.</i> Jones (8 Fed. 303)..... | 1625, 1628 | Conwell <i>v.</i> White Water etc. Co. (Fed. Cas. No. 8,148, 4 Biss. 195) 193, 743 |
| Connecticut River Banking Co. <i>v.</i> Rockbridge Co. (73 Fed. 709).... | 1497 | Cook <i>v.</i> Bee (2 Tenn. Ch. 343).... 691, 699 |
| Connemara, The (108 U. S. 754).... | 214 | <i>v.</i> Hilliard (9 Fed. 4)..... 1641 |
| Conner <i>v.</i> Drake (1 Ohio St. 170)... | 805 | <i>v.</i> Sterling Electric Co. (118 Fed. 45)..... 528 |
| Connolly <i>v.</i> Belt (Fed. Cas. No. 3,117) | 135 | Cooke <i>v.</i> Avery (147 U. S. 375) 184, 1297 |
| Connop <i>v.</i> Hayward (1 Y. & C. Ch. 33) | 968 | Coon <i>v.</i> Abbott (37 Fed. 98).... 1013, 1015 |
| Connor <i>v.</i> Alligator Lumber Co. (98 Fed. 155) | 750 | <i>v.</i> Wilson (113 U. S. 268, 5 Sup. Ct. 537) 1203 |
| Connelly <i>v.</i> Taylor (2 Pet. 556).... 183, | 661 | Coonrad <i>v.</i> Kelly (56 C. C. A. 353, 110 Fed. 841)..... 974, 982 |
| <i>v.</i> Wells (33 Fed. 205)..... | 330, | |
| Consolidated Brake-Shoe Co. <i>v.</i> De- troit Steel etc. Co. (47 Fed. 894) | 115 | |
| Consolidated California etc. Min. Co. <i>v.</i> Baker (181 Fed. 989)....., 1190 | | |

TABLE OF CASES.

1841

[References are to pages.]

| | | | |
|---|---------------------|---|--|
| Coop v. Dr. Savage Physical Development Institute (47 Fed. 899, 48 Fed. 239)..... | 114, 448 | Covington Drawbridge Co. v. Shepherd (21 How. 112) | 197 |
| Cooper v. Newell (155 U. S. 532, 15 Sup. Ct. 355)..... | 191 | Cowdrey v. Galveston etc. R. Co. (98 U. S. 352)..... | 1228, 1520, 1565, 1567, 1574 |
| v. Preston (105 Fed. 403)..... | 217, 516 | v. Galveston etc. R. Co. (1 Woods 331, Fed. Cas. No. 3,293)..... | 1518, 1563, 1564, 1568, 1569, 1570, 1607, 1611 |
| Coosaw Min. Co. v. Carolina Min. Co. (75 Fed. 860)..... | 1414, 1416 | Cowley v. Northern Pac. R. Co. (159 U. S. 569)..... | 31 |
| v. Farmers' Min. Co. (51 Fed. 107) | 1412 | Coy, In re (127 U. S. 781)..... | 1448 |
| v. Farmers' Min. Co. (67 Fed. 31)..... | 854, 858, 872, 1012 | Coy v. Mason (17 How. 580)..... | 308 |
| Copeland v. Bruning (104 Fed. 189)..... | 1266, 1269 | v. Perkins (13 Fed. 112)..... | 1192 |
| Copen v. Flesher (1 Bond 440, Fed. Cas. No. 3,211)..... | 568, 662, 704 | Craig v. Fisher (Fed. Cas. No. 3,332) | 1444 |
| Copp v. De Castro etc. Co. (Fed. Cas. No. 3,215)..... | 799 | v. Smith (100 U. S. 226)..... | 1272, 1276, 1279 |
| Copper River Min. Co. v. McClellan (70 C. C. A. 628, 188 Fed. 383)..... | 796, 797, 871, 1030 | Craighead v. Wilson (18 How. 202) | 1162 |
| Corbett v. Gibson (16 Blatchf. 334)..... | 1107, 1110 | Crane v. McCoy (1 Bond 422, Fed. Cas. No. 3,354)..... | 1459 |
| Corbin v. Taussig (187 Fed. 151)..... | 1420 | v. Penny (2 Fed. 187)..... | 410 |
| Corbus v. Gold Min. Co. (187 U. S. 455) | 298 | Craswell v. Belanger (6 C. C. A. 1, 56 Fed. 529)..... | 1207 |
| Corcoran v. Chesapeake etc. Co. (94 U. S. 741)..... | 1168 | Crawford v. Burnham (Fed. Cas. No. 3,366) | 211 |
| Corker v. Jones (110 U. S. 317)..... | 285 | v. Fisher (1 Hare 436)..... | 1315 |
| Cornell v. Green (43 Fed. 105, <i>appeal dismissed</i> 16 Sup. Ct. 969, 163 U. S. 75)..... | 561 | v. Foster (88 Fed. 975, 28 C. C. A. 242)..... | 778 |
| v. Green (88 Fed. 821, <i>affirmed</i> 37 C. C. A. 85, 95 Fed. 384)..... | 155, 370, 376 | v. Foster (28 C. C. A. 576, 84 Fed. 939)..... | 401 |
| Cornett v. Williams (20 Wall. 226) | 1068 | v. Neal (12 Sup. Ct. 759, 144 U. S. 585)..... | 221, 227, 914 |
| Cortes v. Tannhauser (18 Fed. 687) | 1050 | v. The William Penn (Pet. C. C. 106) | 282, 283 |
| Cortes Co. v. Thannhauser (9 Fed. 228) | 386, 742 | Crawshay v. Thornton (2 Myl. & C. 1) | 1317, 1818 |
| Cosmos Exploration Co. v. Gray Eagle Oil Co. (104 Fed. 20)..... | 1860, 1872 | Credit Co. v. Arkansas etc. R. Co. (15 Fed. 46)..... | 111, 506, 1593, 1630 |
| v. Gray Eagle Oil Co. (190 U. S. 301, <i>affirming</i> 61 L.R.A. 230, 50 C. C. A. 79, 112 Fed. 4) | 25 | Credits Commutation Co. v. U. S. (91 Fed. 573, 84 C. C. A. 12, <i>affirmed</i> 177 U. S. 811) | 837 |
| Coster v. Bank (24 Ala. 37) | 687 | Creighton v. Kerr (20 Wall. 8) | 400, 401, 409 |
| v. Parkersburg Branch R. Co. (181 Fed. 115) | 1549 | Crellin v. Ely (18 Fed. 420) | 386 |
| Costs in Civil Cases (1 Blatchf. 652) | 1189 | Crenshaw v. Miller (111 Fed. 450) | 785 |
| Cotting v. Kansas City etc. Co. (82 Fed. 850) | 1395 | Crescent City Live Stock etc. Co. v. Butchers' Union etc. Co. (12 Fed. 225) | 588 |
| Cottie v. Krements (25 Fed. 494) | 546 | Crocker-Wheeler Co. v. Bullock (134 Fed. 241) | 1028, 1106, 1107, 1113 |
| v. Payne (3 Day 289, Fed. Cas. No. 3,268) | 1208 | Crocket v. Lee (7 Wheat. 522) | 680, 959, 1162 |
| Cotton v. U. S. (11 How. 231) | 281 | Crompton v. Butler (1 Hag. Cons. 460) | 986 |
| Coupe v. Weatherhead (87 Fed. 16) | 902 | Cromwell v. Sac County (94 U. S. 351) | 244 |
| Couper v. Shirley (21 C. C. A. 288, 75 Fed. 168) | 1604 | Cropper v. Coburn (2 Curt. 465, Fed. Cas. No. 3,416) | 18, 31 |
| Covell v. Fowler (144 Fed. 535) | 1540 | Cross v. Allen (12 Sup. Ct. 67, 141 U. S. 528) | 221, 977, 1640 |
| v. Heyman (111 U. S. 176, 4 Sup. Ct. 55) | 754, 1467, 1469 | Eq. Prac. Vol. III.—116 | |

TABLE OF CASES.

[References are to pages.]

| | | | | | |
|--|------------|-------|------|---|------------------|
| Cross v. De Valle (1 Wall. 5) | 630, | 638, | 647 | Dallmeyer v. Farmers' etc. Co. (Fed. Cas. No. 3,546) | 401 |
| v. Evans (86 Fed. 1, 29 C. C. A. 523) | 1576 | | | Dalton v. Milwaukee Mechanics' Ins. Co. (118 Fed. 876) | 196, |
| Crouch v. Hickin (1 Keen 385, 2 Dan. Ch. Pr. 78) | 567 | | | Daisell v. Dueber Mfg. Co. (149 U. S. 315) | 548 |
| v. Kerr (38 Fed. 549) | 471, | 489, | 493 | v. D. W. Case Mfg. Co. (149 U. S. 317, 13 Sup. Ct. 886) .. | 541 |
| Crown Cotton Mills v. Turner (82 Fed. 337) | 409 | | | Dancel v. Goodyear Shoe etc. Co. (128 Fed. 753) | 1103, 1106, |
| Cruickshank v. Bidwell (176 U. S. 73) | 44 | | | 1107, 1108, 1109 | |
| Crystal Springs Land etc. Co. v. Los Angeles (76 Fed. 148) | 181 | | | v. Goodyear Shoe Mfg. Co. (137 Fed. 157) | 1177 |
| Cuddy, Petitioner (181 U. S. 280) | 1425, 1426 | | | v. United Shoe Machinery Co. (120 Fed. 889) | 671, 659 |
| Culver v. Crawford County (Fed. Cas. No. 3,468) | 205-206 | | | Dandridge v. Washington (2 Pet. 370) | 308 |
| Cumberland etc. Assoc. v. Sparks (106 Fed. 101) | 1661 | | | Daniel v. Mitchell (Fed. Cas. No. 3,562) | 110, 974 |
| Cummings v. National Bank (101 U. S. 153) | 18, | 45 | | v. Mitchell (1 Story 198, Fed. Cas. No. 3,563) | 1242, 1245, 1247 |
| Cunningham v. Macon etc. R. Co. (109 U. S. 448) | 298, | 324 | | Daniels v. Benedict (50 Fed. 347) | 44 |
| Curd v. Curd (1 Hare 274) | 1133 | | | v. Benedict (38 C. C. A. 592, 97 Fed. 367) | 523, 530, |
| v. Lewis (1 Dana 351) | 687 | | | 534, 543, | 548 |
| Curling v. Townshend (19 Ves. Jr. 628) | 699 | | | Danville First Nat. Bank v. Cunningham (48 Fed. 510) | 401, 410 |
| Curran v. Campion (29 C. C. A. 26, 85 Fed. 67) | 112, | 245 | | Darragh v. H. Wetter Mfg. Co. (78 Fed. 7, 23 C. C. A. 609) | 18, 31, |
| v. Craig (22 Fed. 101) | 1546 | | | Dartmouth Sav. Bank v. Bates (44 Fed. 546) | 48 |
| Currance v. McQuinn (2 Paine 109, Fed. Cas. No. 3,488) | 1203 | | | Dashiel v. Grosvenor (27 L.R.A. 67, 18 C. C. A. 598, 66 Fed. 334) | 142 |
| Curry v. Lloyd (22 Fed. 258) | 1165, | 1166 | | Dastevignes v. U. S. (58 C. C. A. 346, 122 Fed. 30) | 262, |
| Curtis v. Smith (105 Fed. 949) | 714 | | | D. A. Tompkins Co. v. Catawba Mills (82 Fed. 783) | 313 |
| Cushing v. Smith (Fed. Cas. No. 3,511) | 974 | | | v. Monticello Cotton Oil Co. (137 Fed. 625) | 20 |
| Cutter v. Iowa Water Co. (96 Fed. 777) | 146, | 147, | 150, | v. Moore (74 Fed. 945) | 149 |
| Cutting v. Florida R. etc. Co. (43 Fed. 743) | 900 | | | D'Auxy v. Porter (41 Fed. 68) | 283 |
| v. Gilbert (5 Blatchf. 259) | 265 | | | Davenport v. Dows (18 Wall. 626) | |
| v. Tavares etc. R. Co. (61 Fed. 150, 9 C. C. A. 401) | 1653 | | | 292, | 320 |
| Cuyler v. Atlantic etc. R. Co. (132 Fed. 572) | 1216 | | | v. Moore (74 Fed. 945) | 1289 |
| | | | | Davidson v. Bowden (5 Sneed 180) | 348 |
| | | | | v. Calkins (92 Fed. 230) | 40, |
| | | | | v. Donovan (4 Cranch C. C. 578, Fed. Cas. No. 3,803) | 1809 |
| | | | | v. Lathrop (112 Fed. 353) | 373 |
| Dadirian v. Gullian (79 Fed. 784) | 1391 | | | Davies v. Corbin (112 U. S. 36) | 214 |
| v. Gullian (80 Fed. 986) | 717 | | | v. Lathrop (12 Fed. 353) | 1550 |
| Daggs v. Ewell (Fed. Cas. No. 3,537) | 1639 | | | Davis, <i>Ex p.</i> (112 Fed. 139) | 1448 |
| Daily v. Reid (74 Ala. 415) | 947 | | | Davis v. Alvord (94 U. S. 546) | 18 |
| Daimler Mfg. Co. v. Conklin (145 Fed. 955) | 258 | | | v. Berry (106 Fed. 761) | 145 |
| Daisley v. Dun (98 Fed. 497) | 1110, | 1128, | 1129 | v. Billsland (18 Wall. 659) | 67 |
| Dakin v. Union Pac. R. Co. (5 Fed. 665) | 588 | | | v. Davidson (4 McLean 136, Fed. Cas. No. 3,631) | 427, |
| | | | | v. Davis (72 Fed. 81, 18 C. C. A. 438) | 431 |
| | | | | v. Davis (89 Fed. 532) | 8, |
| | | | | v. Davis (89 Fed. 791, 89 Fed. 532) | 9, |
| | | | | v. Davis (90 Fed. 791, 89 Fed. 532) | 62 |
| | | | | v. Davis (90 Fed. 791, 89 Fed. 532) | 826 |
| | | | | v. Davis (90 Fed. 791, 89 Fed. 532) | 1052, 1107 |

TABLE OF CASES.

1843

[References are to pages.]

| | | | |
|---|------------------------|---|------------------------|
| Davis v. Dunican (19 Fed. 477).... | 1492, 1495, 1548, 1617 | Deltch v. Staub (115 Fed. 300, 53 C. C. A. 137)..... | 876 |
| v. Gray (16 Wall. 203)....31, 588, 1456, 1491, 1510, 1517, 1535, 1537, 1545 | | Delano v. Winsor (Fed. Cas. No. 3,754) | 974 |
| v. Kansas City etc. R. Co. (32 Fed. 863).....659 | | Delauney v. Hermann (Baldw. 132, Fed. Cas. No. 3,757)..... | 791 |
| v. Ladoga Creamery Co. (128 Ind. 222, 27 N. E. 494)....1539 | | De La Vergne etc. Co. v. Montgom- ery Brewing Co. (46 Fed. 829) | 19 |
| v. Martin (113 Fed. 6, 51 C. C. A. 27).....755 | | Delaware County v. Diebold Safe Co. (183 U. S. 473)..... | 963 |
| v. Mills (99 Fed. 89).....213 | | De Loy v. Travelers' Ins. Co. (59 Fed. 319)..... | 197 |
| v. Parkman (18 C. C. A. 398, 71 Fed. 691).....1210 | | Delves v. Bagot (2 Fowl. Ex. Pr. 129) | 1040 |
| v. St. Louis etc. R. Co. (25 Fed. 786) | 794 | De Neufville v. New York etc. Co. (84 Fed. 391)..... | 1371 |
| v. Schwartz (155 U. S. 681)....920 | | v. New York etc. R. Co. (26 C. C. A. 306, 81 Fed. 10)....277, 294, 352, 353 | |
| v. Spelden (104 U. S. 83)....1263, 1266, 1280, 1281 | | Denison etc. R. Co. v. Ranney-Alton etc. Co. (104 Fed. 595, 44 C. C. A. 65) | 1598 |
| v. Spurling (1 Russ. & M. 64)....968 | | Dennehy v. McNulta (86 Fed. 825, 30 C. C. A. 422, 41 L.R.A. 609) | 885 |
| v. Wakelee (156 U. S. 688, 15 Sup. Ct. 555).....28 | | Dennison Mfg. Co. v. Thomas Mfg. Co. (94 Fed. 651).....147, 245 | |
| Dawson v. Pillig (17 L. J. Ch. 394)....604 | | Denniston v. Chicago etc. R. Co. (4 Biss. 414)..... | 1526 |
| v. Poston (28 Fed. 606)....1029, 1088 | | Denny v. Pironi (141 U. S. 121, 11 Sup. Ct. 966).....189, 191 | |
| v. Scriven (1 Hill Eq. 177)....1173 | | Denver etc. R. Co. v. Atchison etc. R. Co. (15 Fed. 650).....1380 | |
| Dawson etc. Co. v. Woodhull (67 Fed. 451, 14 C. C. A. 401) 1098, 1099 | | v. U. S. (59 C. C. A. 579, 124 Fed. 156).....1873, 1874, 1875, 1896, 1404 | |
| Day v. Phelps (Fed. Cas. No. 3,689)....376 | | Deprez v. Thomson-Houston Co. (66 Fed. 22) | 62 |
| v. Woodworth (18 How. 363)....207 | | Derbyshire v. Jones (94 Va. 140) | 637 |
| Dayton Hydraulic Co. v. Felsenthal (116 Fed. 961, 54 C. C. A. 537) 1528, 1530 | | De Roux v. Girard (90 Fed. 537) | 1027 |
| Deacon v. Sewing Mach. Co. (Fed. Cas. No. 3,694).....371 | | v. Girard (105 Fed. 798)..... | 974 |
| Deakin v. Stanton (3 Fed. 435)....1412 | | Desert King Min. Co. v. Wedekind (110 Fed. 873).....504, 815 | |
| Dean v. Mason (20 How. 198)....654 | | De Moines Nav. etc. Co. v. Iowa Homestead Co. (123 U. S. 557) | 178 |
| v. Stewart (2 Atk. 44).....1064 | | De Sobry v. Nicholson (3 Wall. 420) 218, 502 | |
| Debris Case (16 Fed. 25)....256, 328 | | Detroit v. Dean (106 U. S. 537) 222, 294 | |
| Debs, <i>In re</i> (158 U. S. 564)....1426 | | v. Detroit etc. R. Co. (184 U. S. 368) | 53 |
| De Butts v. Bacon (1 Cranch C. C. 569, Fed. Cas. No. 3,717).....993 | | v. Detroit City R. Co. (54 Fed. 1) | 396 |
| Deck v. Whitman (98 Fed. 873)....64 | | v. Detroit City R. Co. (55 Fed. 569) | 75, 640, 798, 805, 809 |
| Decker v. New York Belting etc. Co. (Fed. Cas. No. 3,727).....408 | | Detweller v. Holderbaum (42 Fed. 337) | 823 |
| Dedekam v. Vose (8 Blatchf. 153)....1190 | | De Vaughn v. Hutchinson (165 U. S. 570) | 64 |
| Deere etc. Co. v. Dowagiac Mfg. Co. (82 C. C. A. 351, 153 Fed. 177)....48 | | De Vigner v. New Orleans (16 Fed. 11) | 742 |
| Deering v. Winona Harvester Works (24 Fed. 90) | 794 | | |
| Defiance Water Co. v. Defiance (90 Fed. 753) | 35 | | |
| v. Defiance (191 U. S. 184)....176 | | | |
| De Flores v. Raynolds (8 Fed. 434)....1229 | | | |
| v. Raynolds (16 Blatchf. 408)....1245 | | | |
| Deford v. Mehaffy (14 Fed. 181)....326 | | | |
| De Forest v. Thompson (40 Fed. 375)....1289 | | | |
| De Gottardi, <i>Re</i> (114 Fed. 328)....990, 1027 | | | |
| De Groot v. U. S. (5 Wall. 431)....297 | | | |
| De Hierapolis v. Lawrence (115 Fed. 761) | 110, 245 | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|------------|---|----------------------------|
| De Visser v. Blackstone (6 Blatchf. 235, Fed. Cas. No. 3,840) .. | 1496, 1506 | District of Columbia v. Robinson (180 U. S. 92, 21 Sup. Ct. 283) .. | 984 |
| Dewey v. Stratton (52 C. C. A. 135, 114 Fed. 179) .. | 954, 1293 | Dixon v. Enoch (L. R. 13 Eq. 400) .. | 1120 |
| Dewey Min. Co. v. Miller (96 Fed. 1) .. | 180 | Dobson v. Peck (108 Fed. 904) .. | 538, |
| Dewing v. Perdicaries (96 U. S. 193) .. | 298, | v. Hartford (25 Conn. 232) .. | 597 |
| De Wolf v. Johnson (10 Wheat. 367) .. | 1841 | Dodd v. Ghiselin (27 Fed. 405) .. | 285 |
| Dexter v. Arnold (5 Mason 303, Fed. Cas. No. 3,856) .. | 1183, | v. Hartford (25 Conn. 232) .. | 285 |
| v. Arnold (Fed. Cas. No. 3,858) .. | 898 | Dodge v. Freedman's Sav. etc. Co. (106 U. S. 445, 1 Sup. Ct. 335) .. | 1659 |
| v. Arnold (Fed. Cas. No. 3,859) .. | 971 | v. Perkins (Fed. Cas. No. 3,954) .. | 502 |
| Dial v. Reynolds (96 U. S. 340) .. | 272, | v. Perkins (4 Mason 435) .. | 189, |
| Diamond etc. Co. v. Kelly (120 Fed. 282) .. | 1086 | v. Tulley (12 Sup. Ct. 728, 144 U. S. 451) .. | 316, 1216 |
| v. Sheldon (1 Fed. 870) .. | 1240 | v. Woolsey (18 How. 331) .. | 292 |
| Diamond Drill etc. Co. v. Kelley (138 Fed. 883) .. | 1272 | Doe v. Johnston (3 McLean 323, Fed. Cas. No. 3,958) .. | 382 |
| Diamond Match Co. v. Ohio Match Co. (80 Fed. 117) .. | 258 | v. Northwestern Coal etc. Co. (78 Fed. 62) .. | 1558, |
| Dick v. Hamilton (Deadly 322, Fed. Cas. No. 3,890) .. | 971 | 1579, 1597 | |
| v. Struthers (25 Fed. 103) .. | 1587 | Doggett v. Emerson (1 Woodb. & M. 1, Fed. Cas. No. 3,961) .. | |
| v. Wikelman (77 Fed. 853) .. | 1230 | 1145, 1172, 1178 | |
| Dickerman v. Northern Trust Co. (80 Fed. 450, 25 C. C. A. 549, 176 U. S. 181) .. | 621, 644, | v. Florida R. Co. (99 U. S. 72) .. | 348 |
| Dickerson v. Colgrove (100 U. S. 578) .. | 1841 | Dolan v. Jennings (189 U. S. 386) .. | 896 |
| Dickinson v. Consolidated Traction Co. (114 Fed. 232) .. | 660 | Domestic etc. Soc. v. Gaither (62 Fed. 422) .. | 87 |
| v. Saunders (63 C. C. A. 666, 129 Fed. 18) .. | 1587 | Donahue v. Roberts (19 Fed. 863) .. | |
| Dietz v. Lymer (61 Fed. 792, 10 C. C. A. 71) .. | 796 | 1053, 1081, 1093 | |
| Dillingham v. Hawk (23 L.R.A. 517, 9 C. C. A. 101, 60 Fed. 497) .. | 1549 | Donaldson v. Hazen (Hempst. 423) .. | 200 |
| v. Moran (81 Fed. 759, 26 C. C. A. 596) .. | 1610 | v. Severn River Glass Sand Co. (138 Fed. 691) .. | 1201 |
| v. Moran (42 C. C. A. 91, 101 Fed. 933) .. | 912, | Donne v. Lewis (11 Ves. Jr. 601) .. | 1178 |
| Dillon v. Barnard (Fed. Cas. No. 3,915) .. | 561 | Donnell v. Columbian Ins. Co. (Fed. Cas. No. 3,987) .. | 879 |
| v. Barnard (21 Wall. 430) .. | 561 | v. Columbian Ins. Co. (2 Sumn. 866) .. | 911 |
| v. Oregon etc. R. Co. (86 Fed. 622) .. | 1554 | Donovan v. Campion (29 C. C. A. 30, 85 Fed. 71) .. | 328 |
| Dinsmore v. Central R. Co. (19 Fed. 153) .. | 508 | Dooley v. Hadden (38 U. S. App. 651, 20 C. C. A. 494, 74 Fed. 429) .. | 1375 |
| v. Louisville etc. R. Co. (3 Fed. 593) .. | 1452 | Doolittle, <i>In re</i> (23 Fed. 544) .. | 1512 |
| v. Maroney (Fed. Cas. No. 3,920) .. | 290 | Door v. Gibboney (3 Hughes 332) .. | 410 |
| v. Maroney (4 Blatchf. 416) .. | 1098 | Dormitzer v. Illinois etc. Bridge Co. (6 Fed. 217) .. | 319 |
| v. Philadelphia etc. R. Co. (Fed. Cas. No. 3,921) .. | 199 | Doss v. Tyack (14 How. 297) .. | 927, |
| District Attorney's Fees (1 Blatchf. 647) .. | 1189 | 934, 1231, 1232 | |
| | | Doubleday v. Sherman (8 Blatchf. 45, Fed. Cas. No. 4,020) .. | 1450 |
| | | Dougherty v. Yazoo etc. R. Co. (58 C. C. A. 651, 122 Fed. 211) .. | 1207 |
| | | Douglas v. Butler (6 Fed. 228) .. | 288, |
| | | 289, 460 | |
| | | Douglas Co. v. Tennessee Lumber etc. Co. (118 Fed. 488, 55 C. C. A. 254) .. | 11 |
| | | Dow v. Beldelman (125 U. S. 681) .. | 46 |
| | | v. Memphis etc. R. Co. (20 Fed. 260) .. | 64, 1547, 1614, 1626, 1628 |

TABLE OF CASES.

1845

[References are to pages.]

| | | | |
|--|-----------------------------|--|-----------------------|
| Dowagiac Mfg. Co. v. Lochren (143 Fed. 211, 74 C. C. A. 341) | 875, 1025, 1028, 1033, 1110 | Dundas v. Dutens (2 Cox C. C. 235, 1 Ves. Jr. 196)..... | 360, 361 |
| v. McSherry Mfg. Co. (155 Fed. 524) | 1288 | Dundee Mortg. etc. Co. v. Cooper (26 Fed. 671) | 1090 |
| v. Minnesota Moline Plow Co. (61 C. C. A. 57, 124 Fed. 735) | 1426, 1427 | v. School Dist. No. 1 (21 Fed. 152) | 204 |
| Dowell v. Applegate (152 U. S. 340) | 177 | Dunham v. Cincinnati etc. R. Co. (1 Wall. 254) | 1654 |
| v. Applegate (8 Fed. 698) | 656 | v. Eaton etc. R. Co. (1 Bond 492, Fed. Cas. No. 4,150) | 106, 1311, 1312 |
| Dows v. Chicago (11 Wall. 108) | 44, 266, 647, | Dunks v. Grey (3 Fed. 862) | 1392 |
| Dowson v. Packard (3 Cranch C. C. 66, Fed. Cas. No. 4,049) | 426 | Dunlap v. Stetson (4 Mason 349, Fed. Cas. No. 4,164) | 750 |
| Doyle v. San Diego etc. Co. (43 Fed. 849) | 334 | Dunlevy v. Dunlevy (38 Fed. 459) | 387, 1268, 1288, 1291 |
| Drake v. Delliker (24 Fed. 527) | 314 | Dunn v. Clarke (8 Pet. 1) | 179, 382, 645, 757 |
| v. Goodridge (Fed. Cas. No. 4,062) | 326 | Dunphy v. Kleinsmith (11 Wall. 610) | 66, 67, 1163 |
| Draper v. Davis (102 U. S. 370) | 1231 | Duplex Printing-Press Co. v. Campbell Printing-Press etc. Co. (69 Fed. 250, 16 C. C. A. 220) | 1396, 1409 |
| v. Hudson (Holmes 208) | 731 | Du Pont v. Northern Pac. R. Co. (18 Fed. 467) | 1355, 1378 |
| Dravo v. Fabel (132 U. S. 487) | 435, 974, 1009 | Dupont v. Mussy (4 Wash. C. C. 128, Fed. Cas. No. 4,185) | 480, 482, 863 |
| Dred Scott v. Sandford (19 How. 397) | 502 | Dupree v. Leggett (124 Fed. 700) | 574 |
| Dreutzer v. Frankfort Land Co. (65 Fed. 645, 13 C. C. A. 73) | 1348 | Durant v. Essex Co. (7 Wall. 113) | 816 |
| Drexel v. Berney (14 Fed. 268) | 1118 | v. Washington County (Woolw. 377) | 1425 |
| v. Berney (16 Fed. 522) | 51, 137 | Durrell v. Pritchard (L. R. 1 Ch. 244) | 1343 |
| v. True (74 Fed. 12, 20 C. C. A. 265) | 796 | Duryee v. Webb (Fed. Cas. No. 4,198) | 192 |
| Drey v. Watson (71 C. C. A. 158, 138 Fed. 792) | 1606, 1607 | Dutilh v. Coursault (5 Cranch C. C. 349, Fed. Cas. No. 4,206) | 975 |
| Dreyer v. Golby (62 Ill. App. 347) | 161 | Dwight v. Central Vermont R. Co. (9 Fed. 785, 20 Blatchf. 200) | 505, 502 |
| Dr. Miles Medical Co. v. Snellenburg (152 Fed. 661) | 467 | v. Humphreys (3 McLean 104, Fed. Cas. No. 4,216) | 169 |
| Drope v. Miller (Hempst. 49, Fed. Cas. No. 4,092a) | 932 | D'Wolf v. Rabaud (1 Pet. 476) | 502 |
| Dr. Peter H. Fahrney etc. Co. v. Ruminer (82 C. C. A. 621, 153 Fed. 735) | 1029 | E. | |
| Duane v. Bind (1 Cranch C. C. 281) | 861 | Earle v. Art Library Pub. Co. (95 Fed. 544) | 971, 976 |
| Du Bois v. Kirk (158 U. S. 58, 67, 15 Sup. Ct. 729) | 1222 | v. McCartney (109 Fed. 13) | 925, 926, 928 |
| Dudgeon v. Watson (28 Fed. 161) | 172, 287, | v. McVeigh (91 U. S. 503) | 372, 377 |
| Duff v. Wellsville First Nat. Bank (13 Fed. 65) | 251 | v. Pickin (1 Russ. & M. 547) | 127 |
| Dulaney v. Scudder (94 Fed. 6, 36 C. C. A. 52) | 1341 | Earll v. Metropolitan St. R. Co. (87 Fed. 528) | 544, 549 |
| Duluth v. Abbott (117 Fed. 187, 55 C. C. A. 153) | 1393 | Earp v. Coleman (28 Fed. 340) | 316 |
| Dumont v. Des Moines etc. R. Co. (181 U. S. Appendix clx) | 1278, 1279 | Earth Closet Co. v. Fenner (5 Fisher Pat. Cas. 15) | 1306 |
| v. Fry (18 Fed. 423) | 851 | Easley v. Kellom (14 Wall. 279) | 1271 |
| Duncalf v. Blake (1 Atk. 52) | 535 | Eastburn v. Kirk (2 Johns. Ch. 318) | 1194 |
| Duncan v. Atlantic etc. R. Co. (88 Fed. 840, 4 Hughes 125) | 1266, 1650 | | |
| v. U. S. (7 Pet. 435) | 76 | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|------------------------------|--|--------------------|
| East Coast Cedar Co. v. People's Bank (49 C. C. A. 422, 111 Fed. 446) | 1162 | Edwards v. Bates County (163 U. S. 269)..... | 210 |
| Eastern etc. Asso. v. Denton (13 C. C. A. 44, 65 Fed. 569, 1 Daniel Ch. Prac. 336)..... | 269, 1636 | v. Bay State Gas Co. (120 Fed. 585) | 823 |
| East Lake Land Co. v. Brown (153 U. S. 488) | 182 | v. Hill (59 Fed. 723, 8 C. C. A. 233) | 1628 |
| Eastman v. Sherry (37 Fed. 844).... | 1202 | v. Insurance Co. (20 Fed. 452) | 402 |
| Easton v. Houston etc. R. Co. (40 Fed. 189) | 1609 | v. Mercantile Trust Co. (124 Fed. 381) | 326 |
| v. Houston etc. R. Co. (44 Fed. 7) | 1242 | v. National Window Glass Jobbers Assoc. (139 Fed. 795) | 1540 |
| East Tennessee etc. R. Co. v. Atlantic etc. R. Co. (15 L.R.A. 109, 49 Fed. 698)..... | 1470, 1497 | v. Nichols (Brunner, Col. Cas. 43, 3 Day 16, Fed. Cas. No. 4,298) | 193 |
| Eaton, <i>In re</i> (51 Fed. 804)..... | 178 | Eells v. Holder (12 Fed. 368)..... | 283 |
| Eaton v. St. Louis etc. Co. (7 Fed. 189) | 411 | Egbert v. Citizens' Ins. Co. (7 Fed. 47) | 1087, 1092 |
| Eau Claire v. Payson (46 C. C. A. 466, 107 Fed. 552, 48 C. C. A. 608, 109 Fed. 676)..... | 29, 38, 1162 | Egerton v. Starin (91 Fed. 932)..... | 1207 |
| Eavens v. Davenport (Fed. Cas. No. 4,558) | 192 | Eiffert v. Craps (44 Fed. 164) | 1066, 1093 |
| Ebner v. Moors, (24 How. 147).... | 652 | Eilenbecker v. District Ct. (134 U. S. 81) | 1423, 1426 |
| Ebner v. Zimmerly (55 C. C. A. 430, 118 Fed. 818)..... | 804, 805 | Eillert v. Craps (44 Fed. 792)..... | 1066 |
| Ecaubert v. Appleton (67 Fed. 917, 15 C. C. A. 73)..... | 1200 | Einstein v. Georgia R. Co. (120 Fed. 1008) | 316 |
| Eckert v. Bauer (4 Wash. C. C. 370, Fed. Cas. No. 4,286)..... | 387, 388, 645 | v. Schnebly (89 Fed. 540) | 102, |
| Economist Furnace Co. v. Wrought-Iron Range Co. (86 Fed. 1010) .. | 1388, 1443, 1444, 1446, 1451 | 105, 108, 159, | 569 |
| Eddy v. Lafayette (1 C. C. A. 441, 49 Fed. 807) | 410, 1548 | Elastic Fabric Co. v. Smith (100 U. S. 110) | 1222 |
| v. LaFayette (163 U. S. 458, 16 Sup. Ct. 1082) | 1548 | Eiberson v. Richards (42 N. J. L. 70) | 100 |
| Edgell v. Felder (84 Fed. 69, 28 C. C. A. 382) | 401 | Eldred v. American Palace-Car Co. (103 Fed. 209) | 955 |
| Edison v. American Mutoscope Co. (117 Fed. 192) | 1190 | v. American Palace-Car Co. (44 C. C. A. 554, 105 Fed. 457) | 819, 1404 |
| Edison Electric Co. v. Westinghouse Co. (188 Fed. 460) | 1022, 1041 | v. Michigan Ins. Bank (17 Wall. 545) | 400 |
| Edison Electric Light Co. v. Buckeye Electric Co. (64 Fed. 225) | 1365, 1372, 1411 | Electrical Accumulator Co. v. Brush Electric Co. (44 Fed. 602) | 623, |
| v. Goelet (65 Fed. 612) | 1441 | 710, 711, 805, 808, 810, | 811 |
| v. Universal Light Co. (84 Fed. 229) | 1404 | Electrical Supply Co. v. Put-in-Bay Waterworks etc. Co. (84 Fed. 740) | 1463 |
| v. U. S. Electric Lighting Co. (44 Fed. 294, 45 Fed. 55) | 1105, 1109, 1112, 1115 | Electroilibration Co. v. Jackson (52 Fed. 773) | 159, 764, 767, 769 |
| Edney v. King (39 N. Car. (4 Ired. Eq.) 465) | 95 | Elgin Canning Co. v. Atchison etc. R. Co. (24 Fed. 866) | 403 |
| Edward P. Allis Co. v. Withlacoochee Lumber Co. (44 C. C. A. 673, 105 Fed. 680) | 654, 675 | Elgin Wind Power etc. Co. v. Nichols (12 C. C. A. 578, 65 Fed. 215) | 542, 549 |
| Edward S. May, <i>In re</i> (1 Fed. 743) | 1424, 1442 | Elligutter v. Northwestern Mut. L. Ins. Co. (30 C. C. A. 218, 86 Fed. 500) | 847, 848 |
| | | Elk Fork Oil etc. Co. v. Foster (99 Fed. 495, 39 C. C. A. 615) | 1579, 1603 |
| | | 1477, 1478, 1518, 1567, 1579 | |
| | | v. Jennings (90 Fed. 787) | |
| | | 1579, | |
| | | 1425 | |
| | | Ellerbe, <i>In re</i> (18 Fed. 530) | |
| | | 380 | |
| | | Elliot v. Teal (Fed. Cas. No. 4,389) | |
| | | 1443 | |
| | | Elliott Co. v. Fisher (109 Fed. 380) | 115 |

TABLE OF CASES.

1847

[References are to pages.]

| | | | |
|--|------------|--|---------------------|
| <i>Ellis v. Commander</i> (1 Stroh. Eq. 188) | 1341 | <i>E. P. Allis Co. v. Withlacoochee Lumber Co.</i> (4 C. C. A. 673, 105 Fed. 680) | 677 |
| <i>v. Davis</i> (109 U. S. 485)..... | 40 | <i>Episcopal Church v. Jaques</i> (1 Johns. Ch. 75)..... | 134 |
| <i>v. Jarvis</i> (8 Mason 457)..... | 1202 | <i>Equitable L. Assur. Soc. v. Brown</i> (187 U. S. 311)..... | 177 |
| <i>Ellsworth Trust Co. v. Parramore</i> (108 Fed. 906, 48 C. C. A. 132) | 404 | <i>v. Patterson</i> (1 Fed. 126) | 248, |
| <i>Elmendorf v. Delancey</i> (1 Hopk. Ch. 553) | 155 | 321, 566 | |
| <i>v. Taylor</i> (10 Wheat. 152)..... | 326 | <i>Erb v. Morasch</i> (177 U. S. 584) | 1474, 1549 |
| <i>Ely v. Elliott</i> (Fed. Cas. No. 4,429a) | 382 | <i>Erhardt v. Board</i> (113 U. S. 537, 5 Sup. Ct. Rep. 565) | 1368 |
| <i>v. Monson etc. Mfg. Co.</i> (4 Fisher Pat. Cas. 64, Fed. Cas. No. 4,431) | 934 | <i>Erie Lumber Co. In re</i> (150 Fed. 823) | 1553, 1576 |
| <i>v. New Mexico etc. R. Co.</i> (129 U. S. 291) | 65, | <i>Erie R. Co. v. Heath</i> (10 Biatchf. 214, Fed. Cas. No. 4,516) | 886 |
| <i>Emerson v. Davies</i> (Fed. Cas. No. 4,487) | 1248 | <i>Erskine v. Forest Oil Co.</i> (80 Fed. 583) | 1119 |
| <i>Emerson Co. v. Nimocks</i> (88 Fed. 280) | 1014 | <i>Eslava v. Masange</i> (1 Woods 623, Fed. Cas. No. 4,527) | 1097 |
| <i>Emil Kiewert Co. v. Juneau</i> (24 C. C. A. 294, 78 Fed. 708) | 914 | <i>Essex Paper Co. v. Greacen</i> (45 N. J. Eq. 504, 19 Atl. 466) | 566 |
| <i>Emma Silver Min. Co. v. Emma Silver Min. Co.</i> (1 Fed. 39) | 74, | <i>Estcourt v. Estcourt Hop etc. Co.</i> (L. R. 10 Ch. 276) | 1208 |
| <i>v. Emma Silver Min. Co.</i> (7 Fed. 401) | 521 | <i>Eates v. Gunter</i> (121 U. S. 183) | 214 |
| <i>Emmons v. National etc. Assoc.</i> (68 C. C. A. 327, 135 Fed. 689) | 269 | <i>Ethridge v. Jackson</i> (2 Sawy. 598, Fed. Cas. No. 4,541) | 1191 |
| <i>Emory v. Grenough</i> (8 Dall. 369) | 188 | <i>Etna, The</i> (1 Ware 474, Fed. Cas. No. 4,542) | 286 |
| <i>Empire Circuit Co. v. Jermon</i> (147 Fed. 532) | 1371 | <i>Eubanks v. Leveridge</i> (Fed. Cas. No. 4,544) | 1639 |
| <i>Empire City Amusement Co. v. Wilton</i> (134 Fed. 132) | 259, | <i>Euwerweg v. La Compagnie Generale</i> (35 Fed. 580) | 1087, 1089, 1098 |
| <i>Empire Coal etc. Co. v. Empire Coal etc. Co.</i> (14 Sup. Ct. 66, 150 U. S. 159) | 672 | <i>Eureka Consol. Min. Co. v. Richmond Min. Co.</i> (5 Sawy. 121, Fed. Cas. No. 4,549) | 1400 |
| <i>Empire Distilling Co. v. McNulta</i> (77 Fed. 700, 23 C. C. A. 415) | 835, | <i>Eureka Lake etc. Co. v. Yuba County</i> (116 U. S. 410, 6 Sup. Ct. 429) | 873, 1437 |
| <i>v. Weller</i> (1523, 1528) | | <i>Evans v. Faxon</i> (11 Biss. 178, 10 Fed. 314) | 320 |
| <i>Empire State-Idaho Min. etc. Co. v. Bunker Hill etc. Min. Co.</i> (121 Fed. 973, 58 C. C. A. 311) | 1396 | <i>v. Gee</i> (11 Pet. 80) | 218, |
| <i>Employers' Teaming Co. v. Teamsters' Joint Council</i> (141 Fed. 679) | | <i>v. Gorman</i> (115 Fed. 399) | 502 |
| 1390, 1427, 1433, 1437, 1438, 1489 | | <i>v. Lancaster etc. R. Co.</i> (64 Fed. 626) | 319 |
| <i>Emsheimer v. New Orleans</i> (116 Fed. 893, 186 U. S. 83) | 48 | <i>v. Scribner</i> (58 Fed. 303) | 1121, 1128, 1130 |
| <i>Encyclopaedia Britannica Co. v. Werner</i> (138 Fed. 461) | 1041, | <i>v. Union Pac. R. Co.</i> (58 Fed. 497) | 391 |
| <i>v. Werner Co.</i> (1896, unreported) | 1043 | <i>v. Eveleth v. Southern California R. Co.</i> (123 Fed. 886) | 295 |
| <i>Engelstad v. Dufreane</i> (116 Fed. 582, 54 C. C. A. 38) | 797 | <i>v. Spaulding</i> (9 L.R.A.(N.S. 904, 82 C. C. A. 268, 150 Fed. 523) | 546 |
| <i>England v. Russell</i> (71 Fed. 818) | 42, | <i>v. Everett v. Independent School Dist.</i> (102 Fed. 529) | 341, 343, 660, 1388 |
| <i>v. Hendrick</i> (6 Madd. 205) | 43 | <i>v. Everett v. Independent School Dist.</i> (109 Fed. 697) | 1244 |
| <i>Enoch Morgan's Sons Co. v. Gibson</i> (122 Fed. 420) | 1393 | <i>v. Everett v. Neff</i> (28 Md. 176) | 747 |
| <i>Enamager v. Powers</i> (108 U. S. 292, 2 Sup. Ct. Rep. 648) | 1266, 1268 | 35 | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|-----------------------------------|---|------------|
| Everhart v. Huntsville Female College (120 U. S. 223, 7 Sup. Ct. 555) | 191, 660 | Farmers' Loan etc. Co. v. Cape Fear etc. R. Co. (62 Fed. 675). 1457, 1494, 1611 | |
| Everson v. Equitable L. Assur. Co. (68 Fed. 258, affirmed 71 Fed. 570, 18 C. C. A. 251)..... | 1119, 1124 | v. Centralia etc. R. Co. (69 Fed. 636, 37 C. C. A. 528).. 1482, 1597 | |
| Evory v. Candee (5 B. & A. Pat. Cas. 67, Fed. Cas. No. 4,582).... | 694, 695 | v. Central R. Co. (1 McCrary 352) | 1570 |
| Ewell v. Daggs (108 U. S. 143).... | 1639 | v. Central R. Co. (8 Fed. 60, 2 McCrary 318) .. 1608, 1609, 1610, 1611 | |
| Ewing v. Blight (Fed. Cas. No. 4,589) | 503, 528 | v. Central R. Co. (2 Fed. 656) 848, 860 | |
| Excelsior Pebble Phosphate Co. v. Brown (20 C. C. A. 428, 74 Fed. 321) | 231, 686 | v. Central R. Co. (7 Fed. 537) 1495, 1617 | |
| Excelsior Wooden Pipe Co. v. Seattle (55 C. C. A. 156, 117 Fed. 140) .. | 1123 | v. Chicago etc. R. Co. (27 Fed. 146) | 1645 |
| <i>Ex parte</i> , see names of parties. | | v. Chicago etc. R. Co. (44 Fed. 653) | 1306, 1308 |
| Eyre v. Potter (15 How. 42) .. | 106, 142, 151, 974 | v. Chicago etc. R. Co. (118 Fed. 204) | 1473 |
| Eyster v. Gaff (91 U. S. 521)..... | 825 | v. Denver etc. R. Co. (60 C. C. A. 588, 126 Fed. 46) | 1167 |
| F. | | | |
| Failey v. Talbee (55 Fed. 892) .. | 570, 1542, 1561 | v. Eaton (114 Fed. 14, 51 C. C. A. 640) | 1521, 1522 |
| Fairbank v. Cincinnati etc. R. Co. (4 C. C. A. 408, 54 Fed. 420)..... | 404 | v. Grape Creek Coal Co. (50 Fed. 481, 16 L.R.A. 603) .. 1578 | |
| Fairbanks v. Jacobus (14 Blatchf. 337) | 1866 | v. Grape Creek Coal Co. (65 Fed. 717, 18 C. C. A. 87) .. 1662 | |
| v. Stickney (123 Fed. 79, 59 C. C. A. 209) | 1197 | v. Green Bay etc. Co. (6 Fed. 100, 10 Biss. 203) .. 1262, 1265, 1630 | |
| Fairchild Floral Co. v. Bradbury (87 Fed. 415) | 1378 | v. Green Bay etc. R. Co. (45 Fed. 664) | 1549, 1575 |
| Fairfax v. Hopkins (2 Cranch C. C. 184, Fed. Cas. No. 4,614)..... | 1657 | v. Iowa Water Co. (80 Fed. 487) 846 | |
| Fairfield v. U. S. (76 C. C. A. 590, 146 Fed. 508) | 1024 | v. Kansas City etc. R. Co. (58 Fed. 182) | 1462, 1483 |
| Falk v. Lithograph Co. (4 C. C. A. 648, 54 Fed. 894)..... | 140 | v. Lake St. etc. R. Co. (117 U. S. 51, 20 Sup. Ct. 564) .. 365, 1467, 1469 | |
| Fanshawe v. Tracy (4 Biss. 490, Fed. Cas. No. 4,643) .. | 1391, 1400, 1485, 1440 | v. McClure (24 C. C. A. 64, 78 Fed. 209) | 1606 |
| Fant v. Miller (17 Gratt. 206)..... | 982 | v. Nestelle (79 Fed. 748, 25 C. C. A. 194) | 1577 |
| Fargo v. Louisville etc. R. Co. (6 Fed. 787) | 199 | v. Northern Pac. R. Co. (58 Fed. 257) | 1529 |
| v. Southeastern R. Co. (28 Fed. 906) | 1208 | v. Northern Pac. R. Co. (60 Fed. 803, 25 L.R.A. 414) .. 1512 | |
| Farley v. Hill (150 U. S. 575) .. | 1495 | v. Northern Pac. R. Co. (61 Fed. 546) .. 1498, 1611, 1612, 1613 | |
| v. Kittson (120 U. S. 303, 7 Sup. Ct. 534) .. | 501, 521, 538, 541, 542, 547, 557 | v. Northern Pac. R. Co. (70 Fed. 423) | 826 |
| Farlow v. Kelly (131 U. S. 201, Appx.) | 1621 | v. Northern Pac. R. Co. (72 Fed. 26) | 1555 |
| Farmers' etc. Co. v. Toledo etc. R. Co. (48 Fed. 228)..... | 1825 | v. Northern Pac. R. Co. (76 Fed. 15) | 456 |
| Farmers' Bank v. Beaston (7 Gill & J. 421, 28 Am. Dec. 226)..... | 1498 | v. Northern Pac. R. Co. (79 Fed. 227, 24 C. C. A. 511) 1576, 1577 | |
| Farmers' Loan etc. Co. v. Burlington etc. R. Co. (82 Fed. 805)..... | 1522 | v. Northern Pac. R. Co. (120 Fed. 873, 57 C. C. A. 533) 1518 | |
| | | v. Oregon etc. R. Co. (24 Fed. 407) | 1647 |

TABLE OF CASES.

1849

[References are to pages.]

| | | | |
|---|---------------|--|----------------------|
| Farmers' Loan etc. Co. v. Rockaway etc. R. Co. (69 Fed. 9).... | 1634 | Ferguson v. Dent (46 Fed. 88).... | 1604 |
| v. San Diego St. Car Co. (40 Fed. 105)..... | 828 | v. O'Harras (Pet. C. C. 493, Fed. Cas. No. 4,740) .. | 587, 589, 602 |
| v. San Diego St. Car Co. (45 Fed. 518)..... | 839 | Ferguson Contracting Co. v. Man- hattan Trust Co. (55 C. C. A. 529, 118 Fed. 791) .. | 654, 673, 860, 911 |
| v. Seymour (9 Paige 538).... | 645 | Fidelity etc. Co. v. Fidelity Trust Co. (143 Fed. 152).42, 252, | 326 |
| v. Stuttgart etc. Co. (106 Fed. 565) | 1599 | v. Roanoke Iron Co. (68 Fed. 628) | 1579 |
| v. Waterman (106 U. S. 265) .. | 216 | v. St. Mathews Sav. Bank (104 Fed. 858, 44 C. C. A. 225) .. | 917 |
| v. Wlnona etc. R. Co. (59 Fed. 957) | 1630 | v. U. S. (187 U. S. 815) | 71 |
| Farmers' Nat. Bank v. Hannon (4 Fed. 612)..... | 8 | Fidelity Ins. etc. Co. v. Norfolk etc. R. Co. (88 Fed. 815)..... | 1473 |
| Farmington v. Pillsbury (114 U. S. 138) | 53, 222, 541 | v. Norfolk etc. R. Co. (114 Fed. 389) | 1486 |
| Farni v. Tesson (1 Black 309).... | 310 | v. Roanoke Iron Co. (81 Fed. 439) | 1497, 1505 |
| Farrar v. Bernheim (74 Fed. 435, 20 C. C. A. 496)..... | 898 | v. Shenandoah Iron Co. (42 Fed. 372) | 896, 899, 1594, 1598 |
| v. Bernheim (75 Fed. 136, 21 C. C. A. 264, 20 C. C. A. 496) | 900, 908, 917 | Fidelity Trust etc. Co. v. Fowler Water Co. (113 Fed. 580) .. | 12 |
| v. U. S. (3 Pet. 459)..... | 408 | v. Mobile etc. R. Co. (53 Fed. 687) | 1501 |
| Farson v. Chicago (138 Fed. 184) .. | 1369 | v. Mobile St. R. Co. (53 Fed. 850) | 386, 388, 634 |
| v. Sioux City (106 Fed. 278) 270, 278, 316 | | Field v. Bigelow (5 Wall. (U. S.) 211 note) | 217 |
| Farwell v. Colonial Trust Co. (78 C. C. A. 22, 147 Fed. 480) | 28 | v. Hastings (65 Fed. 279) .. | 476, 1119 |
| Faulder v. Stuart (11 Ves. Jr. 296) .. | 135 | v. Holland (6 Cranch 8) .. | 851, |
| Fawkes v. Pratt (P. Wms. 593).... | 154 | 853, 856, 924, 929, 932, 971, 974 | |
| Fayerweather v. Ritch (89 Fed. 529) | 1024 | v. Schell (4 Blatchf. 435) .. | 1202 |
| v. Trustees (103 Fed. 546) | 519, 527 | Fife v. Bohlen (22 Fed. 878) | 409 |
| Fayerweather Will Cases (103 Fed. 548) | 519 | Files v. Brown (59 C. C. A. 408, 124 Fed. 133) | 1531 |
| Fechheimer v. Baum (43 Fed. 719) .. | 1204 | Filhiol v. Maurice (185 U. S. 110) .. | 180 |
| Fechteler v. Palm (133 Fed. 462, 66 C. C. A. 336) | 41 | Finance Committee v. Charleston etc. R. Co. (45 Fed. 436) .. | 1491, 1611 |
| Federal Mfg. etc. Co. v. International Bank Note Co. (119 Fed. 385) .. | 135, 448 | v. Charleston etc. R. Co. (46 Fed. 508) | 1495 |
| Feeny, <i>In re</i> (Fed. Cas. No. 4,715) 1387, 1443 | | v. Charleston etc. R. Co. (52 Fed. 526) | 1574 |
| Feibelman v. Packard (100 U. S. 421) .. | 184 | v. Charleston etc. R. Co. (82 Fed. 205, 10 C. C. A. 323) 888, 1586 | |
| Felch v. Hooper (Fed. Cas. No. 4,718) | 860, 892 | v. Warren (27 C. C. A. 472, 82 Fed. 525) | 859, 885, 886 |
| Felix v. Patrick (145 U. S. 317, 12 Sup. Ct. 862) | 111 | Findlay v. Hinde (1 Pet. 241) .. | 171 |
| Fell v. Lutwidge (Barn. Ch. 819) .. | 1210 | v. U. S. Bank (Fed. Cas. No. 4,791) | 188 |
| Felton v. Ackerman (61 Fed. 228, 9 C. C. A. 457) | 1474, 1510 | Finley v. Lynn (6 Cranch 238) .. | 1165 |
| Fenn v. Holme (21 How. 482) .. | 8, 25, 62 | Finney v. Guy (23 Sup. Ct. 558, 189 U. S. 385) | 1149 |
| Fenno v. Primrose (125 Fed. 635) .. | 929 | Fischer v. Hayes (6 Fed. 63) .. | |
| Fenwick Hall Co. v. Saybrook (66 Fed. 389) | 1355 | 1438, 1448, 1452 | |
| Fergus Falls v. Fergus Falls Water Co. (72 Fed. 878, 19 C. C. A. 212) 181, 1206 | | v. Hayes (19 Blatchf. 25, 6 Fed. 76) | 485, 1012, 1015 |
| | | v. Hayes (7 Fed. 96) | 1452 |
| | | v. Hayes (16 Fed. 469) .. | 896, 903 |
| | | v. Hayes (22 Fed. 92) | 846 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|---|-----------------|---|---------------------|
| Fischer v. Knight (61 Fed. 491, 9 C. C. A. 582) | 1539 | Foote v. Massachusetts Ben. Assoc. (89 Fed. 23)..... | 231, 409 |
| v. Wilson (16 Blatchf. 220, 4 B. & A. Pat. Cas. 228, Fed. Cas. No. 4,812)..... | 486 | Forbes v. Memphis etc. R. Co. (2 Woods 323, Fed. Cas. No. 4,926) | 315 |
| Fish v. Miller (5 Paige 26)..... | 474 | Ford v. Douglas (5 How. 143) | 640 |
| v. Ogdensburg etc. R. Co. (79 Fed. 181) | 742, 743 | v. Taylor (137 Fed. 149)..... | |
| Fishback v. Western Union Tel. Co. (161 U. S. 98)..... | 567 | 1458, 1479, 1481, 1614 | |
| Fishel v. Lueckel (58 Fed. 501).... | 140 | v. Taylor (140 Fed. 356, 137 Fed. 149)..... | 1361, 1406, 1409 |
| Fisher v. Boody (1 Curt. C. C. 206) 109, 111, 141 | | Fordyce v. Kansas City etc. R. Co. (145 Fed. 586)..... | 1585 |
| v. Boody (Fed. Cas. No. 4,814) 1204 | | v. Omaha etc. R. Co. (145 Fed. 544) | 890, 899, 911, 1585 |
| v. Moog (89 Fed. 665)..... | 148, | v. Peper (16 Fed. 518)..... | 316 |
| 149, 156 | | Foreman v. Central Trust Co. (18 C. C. A. 821, 71 Fed. 776)..... | 1545 |
| v. Rutherford (Baldw. 189, Fed. Cas. No. 4,828)..... | 655, 677 | Forest Oil Co. v. Crawford (101 Fed. 849, 42 C. C. A. 54)..... | 822, 828 |
| v. Shropshire (147 U. S. 188) | 827, 834 | Fergay v. Conrad (6 How. 201).... | |
| Fisk, <i>See p.</i> (118 U. S. 712, 5 Sup. Ct. 724)..... | 138, 1447 | 855, 1160 | |
| Fitch v. Cornell (Fed. Cas. No. 4,834) | 800 | Forrest v. Union Pac. Co. (47 Fed. 1) | 403 |
| v. Creighton (24 How. 159)... | 829 | Forsyth v. Pierson (9 Fed. 801)... | |
| Fitchett v. Blows (74 Fed. 47, 20 C. C. A. 286) | 218, 1155 | 395, 411 | |
| Fittion v. Phoenix Assur. Co. (23 Fed. 3) | 928, 925 | Fortier v. New Orleans Bank (112 U. S. 439)..... | 291 |
| Fitzgerald etc. Constr. Co. v. Fitz- gerald (11 Sup. Ct. 36, 137 U. S. 98) | 879, 408, 409 | Fortunate, <i>In re</i> (123 Fed. 622)... | 1443 |
| Flack v. Holm (1 Jac. & W. 404).... | 1831 | Fosdick v. Schall (99 U. S. 235).... | |
| Flagg v. Mann (2 Sumn. 486, Fed. Cas. No. 4,847)..... | 977, 1010 | 1581, 1582, 1589 | |
| v. Walker (118 U. S. 659).... | 64 | Fosha v. Western Union Tel. Co. (114 Fed. 701) | 231, 409 |
| Flanders v. Aetna Ins. Co. (Fed. Cas. No. 4,852)..... | 778 | Foss v. Denver First Nat. Bank (3 Fed. 185)..... | 330 |
| Fleming v. Souter (6 Wall. 747).... | 1177 | Foster v. Ballenberg (48 Fed. 821) 1374 | |
| Fletcher v. Holmes (25 Ind. 458).... | 637 | v. Cleveland etc. R. Co. (56 Fed. 434) | 194 |
| v. New Orleans etc. Co. (20 Fed. 345) | 1405 | v. Crawford (80 Fed. 991).... | 778 |
| v. Turner (5 McLean 468).... | 200 | v. Goddard (1 Black 506).... | |
| Florence Bank v. U. S. Savings etc. Co. (104 Ala. 207, 18 So. 110).... | 1479 | 104, 899, 958 | |
| Florence Sewing Mach. Co. v. Singer Mfg. Co. (8 Blatchf. 118, Fed. Cas. No. 4,884)..... | 567 | v. Jett (20 C. C. A. 870, 74 Fed. 678) | 1639 |
| Florida v. Georgia (17 How. 478).. 207, 840, 1144 | | v. Mansfield etc. R. Co. (36 Fed. 627 <i>affirmed</i> 13 Sup. Ct. 28, 146 U. S. 88) | 742 |
| Florida Cent. etc. R. Co. v. Bell (176 U. S. 821)..... | 182 | v. Mora (98 U. S. 425),..... 8, 14 | |
| Florida Mortg. etc. Co. v. Finlayson (74 Fed. 671)..... | 464 | v. Swasey (2 Woodb. & M. 217, Fed. Cas. No. 4,984) | 567 |
| Flower v. MacGinniss (50 C. C. A. 291, 112 Fed. 377).... | 364, 1050, 1078 | Foulk v. Gray (120 Fed. 156)..... | 231 |
| Foley, <i>In re</i> (76 Fed. 390)..... | 28 | Fountain v. Angelica (12 Fed. 8) | 221 |
| In re (80 Fed. 949)..... | 1467 | Four hundred and twenty Min. Co. v. Bullion Min. Co. (3 Sawy. 634, Fed. Cas. No. 4,989) | |
| v. Hartley (72 Fed. 570) | 554, 1467 | 65 | |
| Fountain v. Ravenel (17 How. 369) | 23 | Fourniquet v. Perkins (16 How. 82) 901, 908, 1148, 1220 | |
| | | Fourth Nat. Bank v. New Orleans etc. R. Co. (11 Wall. 624)..... | 819 |
| | | Fowler v. Equitable Trust Co. (141 U. S. 411, 12 Sup. Ct. 8) | 1216 |
| | | v. Jarvis-Conklin Mortg. Co. (63 Fed. 588, 63 Fed. 14) | |
| | | 1492, 1494, 1613 | |

TABLE OF CASES.

1851

[References are to pages.]

| | | | |
|---|---------------------|--|---------------|
| Foster v. Merrill (11 How. 375).... | 1049 | Fuller v. Metropolitan L. Ins. Co. (31 Fed. 696) | 810 |
| v. Osgood (4 L.R.A.(N.S.) 824, 72 C. C. A. 276, 141 Fed. 20) | 817, 1540, 1552 | v. Montague (53 Fed. 206).... | 364 |
| Fox v. Blossom (Fed. Cas. No. 5,008) 1639 | | v. Montague (8 C. C. A. 100, 59 Fed. 212)..... | 940 |
| v. Hempfield R. Co. (2 Abb. (U. S.) 155, Fed. Cas. No. 5,011) | 1503 | Fullerton v. U. S. Bank (1 Pet. 604) 76 | |
| Francis v. Flynn (118 U. S. 385).... | 1351 | Fulton County v. Mississippi etc. R. Co. (21 Ill. 367)..... | 96 |
| Frank v. Denver etc. R. Co. (23 Fed. 757) | 1512 | Furbish v. Sears (Fed. Cas. No. No. 5,160)..... | 1626 |
| v. Geiger (121 Fed. 126).... | 794 | Furrer v. Ferris (145 U. S. 132) .. | 914 |
| Frankfort v. Deposit Bank (120 Fed. 165, 59 C. C. A. 539, 124 Fed. 18) | | Fussell v. Gregg (113 U. S. 550) .. | |
| | 1264, 1287 | 28, 40 | |
| Franklin Sav. Bank v. Taylor (4 C. A. 55, 53 Fed. 854, 9 U. S. App. 406) .. | 1538, 1543 | G. | |
| Frazer v. Colorado Dressing etc. Co. (5 Fed. 183)..... | 18 | Gableman v. Peoria etc. R. Co. (179 U. S. 336)..... | 185 |
| Freeman v. American Surety Co. (116 Fed. 549)..... | 281 | Gadsby v. Miller (Fed. Cas. No. 5,167) | 778 |
| v. Clay (2 U. S. App. 254, 2 C. C. A. 587, 52 Fed. 1) .. | 1262, 1286 | Gage v. Herring (107 U. S. 640, 2 Sup. Ct. 819)..... | 1197 |
| v. Howe (24 How. 450)..... | 15, 754, 794, 1467 | v. Pumpelly (108 U. S. 164) .. | 212 |
| French v. Dear (5 Ves. Jr. 547).... | 169 | Gaines v. Agnew (1 Woods 238) .. | |
| v. First Nat. Bank (7 Ben. 488, Fed. Cas. No. 5,099) .. | 432, 449 | 442, 610, 612 | |
| v. Gagen (105 U. S. 509) .. | 824, | v. Chew (2 How. 619) .. | 18, 62, |
| | 832, 836, 1155 | 244, 250, 277 | |
| v. Hay (22 Wall. 238) .. | 667, | v. Hale (26 Ark. 199)..... | 1850 |
| | 682, 683, 955, 1161 | v. Mausseaux (1 Woods 118, Fed. Cas. No. 5,176) | 517 |
| v. Union Pac. R. Co. (92 Fed. 26) | 1547 | v. Mills (13 U. S. App. 229, 4 C. C. A. 521, 54 Fed. 614) .. | 1605 |
| Frere v. Green (19 Ves. Jr. 319).... | 1074 | v. New Orleans (27 Fed. 411) .. | 799 |
| Frese v. Biedenfeld (14 Blatchf. 402, Fed. Cas. No. 5,111) | 1031 | v. New Orleans (1 Woods 104) .. | 896 |
| Frevall v. Bache (5 Cranch C. C. 462) | 1044 | v. Nicholson (9 How. 356) | 1417 |
| v. Bache (Fed. Cas. No. 5,113) .. | 1045 | v. Relf (15 Pet. 9) .. | 13, 62, 65, |
| Frey v. Willoughby (11 C. C. A. 463, 68 Fed. 866)..... | 40 | 78 | |
| Friedman v. Harrington (56 Fed. 880) | 798 | v. Relf (12 How. 580) | 963 |
| Friezen v. Allemania F. Ins. Co. (80 Fed. 349) | 401 | v. Rugg (148 U. S. 228, 13 Sup. Ct. 611) | 1284 |
| Frisbie v. Chesapeake etc. R. Co. (57 Fed. 1) | 197 | v. Thompson (7 Wall. 347) | 26 |
| Front Street Cable R. Co. v. Drake (84 Fed. 257) | 1576 | Gainsborough v. Gifford (2 P. Wms. 427) | 689 |
| Frost v. Spitley (121 U. S. 552, 7 Sup. Ct. 1129) | 8, 19, 39 | Galatian v. Erwin (Hopk. Ch. 48, affirmed 8 Cow. 361) | 624, 627 |
| Frow v. De La Vega (15 Wall. 552) .. | 952 | Gale v. Southern Bldg. etc. Assoc. (117 Fed. 732) | 191 |
| Fry v. Rousseau (8 McLean 106).... | 200 | Gallagher v. Roberts (1 Wash. C. C. 320, Fed. Cas. No. 5,194) .. | 538, 546 |
| Fullagar v. Clark (18 Ves. Jr. 481) | 926, | Gallaway v. Fort Worth Bank (186 U. S. 177) | 364 |
| Fuller v. Knapp (24 Fed. 100).... | 930 | Gallego v. Chevalie (2 Brock. 285, Fed. Cas. No. 5,200) | 289 |
| 445, 471, 588, 588, 612 | | Galveston etc. R. Co. v. Cowdrey (11 Wall. 459) | 1581 |
| | | v. Gonzales (151 U. S. 496, 14 Sup. Ct. 401) .. | 233, 402, 410 |
| | | v. Texas (170 U. S. 226) .. | 182 185 |
| | | Gamble v. San Diego (79 Fed. 487) .. | 1467 |
| | | Gamewell Fire Alarm Tel. Co. In re (20 C. C. A. 111, 78 Fed. 908) .. | |
| | | 1250, 1286, 1287 | |

[References are to pages.]

| | | | |
|---|---------------------------|--|----------------|
| Gamewell Fire Alarm Tel. Co. v. Municipal Signal Co. (23 C. C. A. 250, 77 Fed. 490).... | 1222 | Georgia Lumber Co. v. Bissell (9 Paige 225)..... | 1829 |
| v. New York (31 Fed. 312).... | | Georgia Pine Turpentine Co. v. Billfinger (129 Fed. 131)..... | 804, 807 |
| 432, 441, 468, 476 | | Gerard v. Penswick (1 Swanst. 533)..... | 1133 |
| Garinger v. Palmer (61 C. C. A. 436, 126 Fed. 906)..... | 852 | Germania F. Ins. Co. v. Francis (11 Wall. 210)..... | 198 |
| Garner v. Second Nat. Bank (67 Fed. 833, 16 C. C. A. 86).... | 806, 1478 | German Ins. Co. v. Downman (115 Fed. 481, 53 C. C. A. 213)..... | 11 |
| v. Southern Mut. etc. Assoc. (28 C. C. A. 381, 84 Fed. 3).... | 1467 | German Lutheran Evangelical etc. Congregation v. Heise (44 Md. 465)..... | 1067 |
| Garnett v. Macon (Fed. Cas. No. 5,245) | 308 | Gernon v. Boccaline (2 Wash. C. C. 199, Fed. Cas. No. 5,386)..... | 541, 977 |
| Garrett v. Garrett (24 C. C. A. 173, 78 Fed. 472)..... | 1896 | v. Boecaline (2 Wash. C. C. 130, Fed. Cas. No. 5,387)..... | 1328, |
| v. New York Transit etc. Co. (29 Fed. 129)..... | 221, 501, 504 | 1334, 1335, 1337 | |
| Garsed v. Beall (92 U. S. 684).... | 924, | Gettings v. Burch (9 Cranch 372)..... | 960 |
| 925, 935 | | Giant Powder Co. v. California etc. Co. (5 Fed. 197)..... | 1243, |
| Gartside Coal Co. v. Maxwell (20 Fed. 187)..... | 1053, 1085 | 1244, 1248, 1253, 1255 | |
| Gasquet v. Crescent City Brewing Co. (49 Fed. 493)..... | 892, 893 | v. California Powder Works (98 U. S. 126)..... | 582 |
| v. Fidelity Trust etc. Co. (6 C. C. A. 253, 57 Fed. 80, reversing 53 Fed. 850).... | 386, 388, 634, 635 | v. Safety Nitro Powder Co. (19 Fed. 509)..... | 516, 530, 689 |
| Gass v. Stinson (Fed. Cas. No. 5,281, 2 Sumn. 605) | 859, 862, 871, 1010, 1011 | Gibson v. Chew (16 Pet. 315)..... | 200 |
| v. Stinson (3 Sumn. 98)..... | 1068 | v. Chouteau (13 Wall. 102)..... | 14 |
| Gassies v. Ballon (6 Pet. 761)..... | 192 | v. Memphis etc. R. Co. (31 Fed. 558)..... | 1194, 1201 |
| Gates v. Buckl (4 C. C. A. 116, 58 Fed. 961)..... | 1467 | v. Shufeldt (122 U. S. 27)..... | 216 |
| Gaylord v. Ft. Wayne etc. R. Co. (6 Biss. 286, Fed. Cas. No. 5,284)..... | 1467 | v. Standard Automatic Gas Engine Co. (134 Fed. 799, 67 C. C. A. 445)..... | 1484 |
| v. Kelshaw (1 Wall. 81)..... | 1203, 1205 | Gier v. Gregg (4 McLean 202, Fed. Cas. No. 5,406)..... | 690, 699, 1192 |
| Gay Mfg. Co. v. Camp (18 C. C. A. 137, 65 Fed. 794, 15 C. C. A. 226, 68 Fed. 67) | 898, 897, 912 | Gila Bend etc. Co. v. Gila Water Co. (202 U. S. 270)..... | 79 |
| General Electric Co. v. Bullock Electric Mfg. Co. (138 Fed. 412).... | 584 | Gilbert v. Murphy (10 Fed. 161)..... | 515 |
| v. McLaren (140 Fed. 876).... | 1440, 1441, 1443 | v. Van Arman (1 Flipp. 421, Fed. Cas. No. 5,414)..... | 790 |
| v. New England etc. Co. (128 Fed. 738, 63 C. C. A. 448)..... | 538 | Gilchrist v. Helena etc. Co. (58 Fed. 708)..... | 16, 18 |
| v. Whitney (20 C. C. A. 874, 74 Fed. 664) | 1523, 1524 | Giles v. Harris (189 U. S. 475).... | 24, |
| General Fire Extinguisher Co. v. Lamar (72 C. C. A. 501, 141 Fed. 853) | 903 | 25, 211 | |
| Generes v. Campbell (11 Wall. 198)..... | 18 | v. Paxson (86 Fed. 882)..... | 1045, |
| Geney v. Maynard (44 Mich. 578).... | 1147 | 1089, 1091 | |
| Georgetown v. Alexander Canal Co. (12 Pet. 91))..... | 341 | Gill v. Watson (3 Atk. 522)..... | 1011 |
| Georgia v. Atlantic etc. R. Co. (8 Woods 434)..... | 1504, 1574 | Gillette v. Bate Refrigerating Co. (12 Fed. 108)..... | 1242, 1247 |
| v. Brailsford (2 Dall. 402).... | 1375 | v. Doheny (65 Fed. 715)..... | 578 |
| v. Stanton (6 Wall. 50)..... | 24 | Gilmur v. Libbey (Fed. Cas. No. 5,445) | 1203 |
| | | Gilmore v. Bort (184 Fed. 658).... | |
| | | 684, 805, 810 | |
| | | Girard Ins. etc. Co. v. Cooper (162 U. S. 529, 16 Sup. Ct. Rep. 879, affirming 2 C. C. A. 245, 51 Fed. 832)..... | 1577 |
| | | Girard L. Ins. etc. Co. v. Cooper (51 Fed. 382, 2 C. C. A. 245)..... | 1525 |

TABLE OF CASES.

1853

[References are to pages.]

| | | | |
|--|------------------------|--|--------------------------|
| Girard Trust Co. v. McKinley-Lanning L. etc. Co. (143 Fed. 355)... | 1604, 1605, 1607 | Gordon v. Hobart (2 Story 243, Fed. Cas. No. 5,608)..... | 848, 860 |
| Girault v. Adams (61 Md. 1)..... | 1067 | v. Lewis (2 Sumn. 148, Fed. Cas. No. 5,618)..... | 455 |
| Glass v. Concordia Parish Police Jury (176 U. S. 207)..... | 200 | v. Newman (62 Fed. 686, 10 C. C. A. 587)..... | 1600, 1601 |
| Glenn v. Dimmock (48 Fed. 550).... | 1241 | v. St. Paul Harvester Works (28 Fed. 147) | 532 |
| v. Marbury (145 U. S. 499)... | 1537 | v. Chattanooga Third Nat. Bank (144 U. S. 97)..... | 188 |
| v. Noonan (48 Fed. 408)..... | 1240 | Gormley v. Bunyan (188 U. S. 623, 11 Sup. Ct. 453)..... | 654, 1086, 1087 |
| Globe-Wernicke Co. v. Fred Macey Co. (56 C. C. A. 804, 119 Fed. 696) | 147, 676 | v. Clark (134 U. S. 388, 10 Sup. Ct. 554) | 18, 28, 31, 1804, 1808 |
| Goddard v. Ordway (101 U. S. 745)..... | 798, 1237, 1251 | Gormully etc. Co. v. Bretz (64 Fed. 612) | 135 |
| Godden v. Kimmell (99 U. S. 201)... | 111, 974 | Goss Printing Press Co. v. Scott (119 Fed. 941)..... | 874 |
| Godfrey v. McConnell (151 Fed. 783) | 35 | Gottardi, <i>In re</i> (114 Fed. 328).... | 902 |
| v. Terry (97 U. S. 171)..... | 187, 331, 1177 | Gottfried v. Crescent Brewing Co. (22 Fed. 433)..... | 891 |
| Goebel v. American R. etc. Co. (55 Fed. 825) | 114, 154 | Gould v. Evansville etc. R. Co. (91 U. S. 586)..... | 561 |
| Goff v. Kelly (74 Fed. 327).... | 635, 646 | v. Gould (3 Story 516).... | 973, 1076 |
| v. Norfolk etc. R. Co. (36 Fed. 299) | 221 | v. Gould (Fed. Cas. No. 5,637)..... | 974 |
| Golden v. Morning News (42 Fed. 112) | 408 | v. Sessions (67 Fed. 168, 14 C. C. A. 366)..... | 1448 |
| Goldey v. Morning News (156 U. S. 518, 15 Sup. Ct. 559)..... | 408, 405 | Grace v. American Cent. Ins. Co. (109 U. S. 278, 3 Sup. Ct. 207)... | 187, 191 |
| Goldmark v. Kreling (25 Fed. 349)..... | 1384, 1399, 1411 | Gracie v. Palmer (8 Wheat. 699).... | 409 |
| Goldsmith v. Gilliland (22 Fed. 865) | 113 | Graffam v. Burgess (117 U. S. 180, 6 Sup. Ct. 686).... | 148, 144, 152, 678, 1531 |
| v. Gilliland (24 Fed. 154)..... | 505, 506, 519 | Graham v. La Crosse etc Co. (3 Wall. 704) | 1160 |
| Goldstein v. Whelan (62 Fed. 124)..... | 786 | v. Mason (4 Cliff. 88, Fed. Cas. No. 5,671)..... | 455, 457 |
| Goodlett v. Louisville etc. R. Co. (122 U. S. 404)..... | 198 | v. Spencer (14 Fed. 603)..... | 401 |
| Goodman v. Niblack (102 U. S. 556)..... | 392 | v. Stucken (4 Blatchf. 50, Fed. Cas. No. 5,677)..... | 1330, 1331, 1335 |
| Goodwin v. Bishop (145 Ill. 421, 34 N. E. 47)..... | 474 | v. Swayne (109 Fed. 366, 48 C. C. A. 411)..... | 1251 |
| v. Fox (129 U. S. 601, 9 Sup. Ct. 367)..... | 875 | Grain-Drill Mfg. Co. v. Reinstedler (25 Fed. 198)..... | 792 |
| Goodyear v. Blake (Fed. Cas. No. 5,560) | 218 | Grainger v. Douglas Park Jockey Club (78 C. C. A. 199, 148 Fed. 513) | 1394 |
| v. Chaffee (Fed. Cas. No. 5,564)..... | 400 | Grand Chute v. Winegar (15 Wall. 373) | 50 |
| v. Day (2 Wall. Jr. 283)..... | 1366 | Grand Haven First Nat. Bank v. Forrest (44 Fed. 246)..... | 1092 |
| v. Foby (Fed. Cas. No. 5,585)... | 528 | Grand Trunk R. Co. v. Central Vermont R. Co. (81 Fed. 541)..... | 1528 |
| v. Providence Rubber Co. (2 Cliff. 351, Fed. Cas. No. 5,583)..... | 923, 927, 929, 934 | v. Central Vermont R. Co. (85 Fed. 87)..... | 1465 |
| v. Sawyer (17 Fed. 2).... | 1141, 1192, 1193, 1203 | v. Central Vermont R. Co. (88 Fed. 622)..... | 1637 |
| v. Toby (6 Blatchf. 130, Fed. Cas. No. 5,585)..... | 531, 575 | | |
| Goodyear Dental Vulcanite Co. v. Folsom (3 Fed. 509)..... | 1347 | | |
| Goodyear Shoe Machinery Co. v. Daniel (119 Fed. 692, 56 C. C. A. 300)..... | 273 | | |
| Gordan v. Jackson (72 Fed. 86).... | 89 | | |
| Gordon v. Gilfoil (99 U. S. 168)... | 554, 1626, 1627 | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|---|----------------------------------|---|--------------------|
| Grand Trunk R. Co. v. Tenant (66 Fed. 922, 14 C. C. A. 190) | 196, 203 | Green v. Fiske (108 U. S. 518).... 1288 | |
| v. Twitchell (59 Fed. 727, 8 C. C. A. 237) | 191, 1207 | v. Hanberry (2 Brock. 419).... 1510 | |
| Grant v. Buckner (172 U. S. 282, 19 Sup. Ct. 163)..... | 1549 | v. Mills (30 L.R.A. 90, 16 C. C. A. 516, 69 Fed. 852)..... 24 | |
| v. Naylor (4 Cranch 224)..... | 1099 | v. Turner (86 Fed. 837, 30 C. C. A. 427) | 1641 |
| v. Phoenix Ins. Co. (106 U. S. 249, 1 Sup. Ct. 414).... 855, | 1162 | v. Turner (98 Fed. 756).... 14, 53, 55 | |
| v. Phoenix Ins. Co. (121 U. S. 105, 7 Sup. Ct. 841).... 246, | 588, 1015, 1062 | v. Underwood (86 Fed. 427, 30 C. C. A. 162) | 16 |
| Grape Creek etc. Co. v. Farmers' Loan etc. Co. (12 C. C. A. 350, 63 Fed. 895) | 1632, 1846, 1847 | Greene v. Aurora R. Co. (158 Fed. 909) | 469 |
| Gratton v. Appleton (3 Story 756) | 1207, 1215 | v. Bateman (2 Woodb. & M. 359, Fed. Cas. No. 5,782).... 1203 | |
| Gravelle v. Minneapolis etc. R. Co. (16 Fed. 435)..... | 1055 | v. Bishop (1 Cliff. 186, Fed. Cas. No. 5,763) | 879, 898, 911 |
| Gravenberg v. Laws (100 Fed. 1, 40 C. C. A. 240) | 9 | v. Star Cash etc. Co. (99 Fed. 656) | 1474, 1475, 1554 |
| Graver v. Faurot (64 Fed. 241) | 1257 | v. Tacoma (53 Fed. 562).... 210 | |
| Gray v. Beck (6 Fed. 595) | 28 | Greenleaf v. Queen (1 Pet. 138)... | 567, 718 |
| v. Blanchard (97 U. S. 564) ... | 208 | Greenville-Murray v. Clarendon (L. R. 9 Eq. 11)..... | 114 |
| v. Brignardello (1 Wall. 627).... | 1178 | Greenwalt v. Duncan (15 Fed. 35)... | 526 |
| v. Chicago etc. R. Co. (Woolw. 63, Fed. Cas. No. 5,713)... | 77, 1347, 1348, 1349, 1435, 1436 | v. Tucker (10 Fed. 884)..... | 221 |
| v. Davis (1 Woods 420, Fed. Cas. No. 5,715)..... | 1538 | Greenwood v. Churchill (1 Myl. & K. 559) | 276 |
| v. New York Nat. Bldg. etc. Assoc. (125 Fed. 512).... | 896, 915 | v. Freight Co. (105 U. S. 13)... | 352 |
| v. Tunstall (Hempst. 558, Fed. Cas. No. 5,780)..... | 788 | Greenwood etc. R. Co. v. Strang (77 Fed. 499) | 20 |
| Gray Jacket, The (5 Wall. 370).... | 1145 | Gregg v. Metropolitan Trust Co. (59 C. C. A. 637, 124 Fed. 721).... 1585 | |
| Great North of England etc. R. Co. v. Clarence R. Co. (1 Coll. Ch. Cas. 507) | 1843 | v. Metropolitan Trust Co. (197 U. S. 183) | 1587, 1592 |
| Great Southern Fireproof Hotel Co. v. Jones (177 U. S. 449, 54 C. C. A. 165, 116 Fed. 799).... 199, 1206 | 1552 | Gregory v. Boston Safe Deposit Co. (144 U. S. 665) | 816 |
| Great Western Min. Co. v. Harris (198 U. S. 561).... 1541, 1542, 1552 | 16 | v. Pike (29 Fed. 588).... 387, 633 | |
| Great Western Tel. Co. v. Purdy (16 Sup. Ct. 810, 162 U. S. 329).... | 726, 1542 | v. Pike (15 C. C. A. 33, 67 Fed. 837).... 634, 806, 810, 813, 820, 824, 827 | |
| Greeley v. Lowe (155 U. S. 58).... | 17, 231, 392, 398 | v. Pike (25 C. C. A. 48, 79 Fed. 520) | 382, 384, 385, 387 |
| v. Smith (Fed. Cas. No. 5,747).... | 330 | v. Stetson (133 U. S. 579).... | 321 |
| v. Smith (3 Story 657)..... | 1488 | v. Swift (39 Fed. 708)..... | 334 |
| Green v. Biddle (8 Wheat. 1)..... | 1144 | Greig v. Russell (115 Ill. 484).... | 161 |
| v. Bogue (158 U. S. 478).... | 552 | Grether v. Wright (75 Fed. 742, 23 C. C. A. 498)..... 17, 18, 20, 491 | |
| v. Compagnia Generale Italiana affirmed 42 C. C. A. 580, Di Navigation (82 Fed. 490, 102 Fed. 650).... 1039, 1071, 1074 | 62 | Griffing v. Gibb (2 Black 519).... | 564 |
| v. Creighton (23 How. 90).... | 62 | Griffith v. Shaw (89 Fed. 313).... | 959 |
| | | Gring v. Chesapeake etc. Canal Co. (129 Fed. 996) | 1373 |
| | | Griswold v. Bacheller (75 Fed. 470).... | 316 |
| | | v. Bacheller (77 Fed. 857).... 528, 531 | |
| | | v. Central Vermont R. Co. (9 Fed. 797, 20 Blatchf. 212).... 1472 | |
| | | v. Hill (Fed. Cas. No. 5,835, 1 Paine 890) | 466, 467 |
| | | v. Hilton (87 Fed. 256).... 731, 734 | |
| | | Groel v. United Electric Co. (132 Fed. 252) | 201, 321, 352, 353 |
| | | Groshols v. Newman (21 Wall. 481).... | 959 |

TABLE OF CASES.

1855

[References are to pages.]

| | | | |
|--|----------------------------------|---|-------------------------------------|
| Grohs v. Palmer (105 Fed. 833) | 1057, 1058 | Halderman v. Halderman (Fed. Cas. No. 5,908) | 948 |
| v. Scott Mfg. Co. (48 Fed. 35) | 333 | Hale v. Allinson (102 Fed. 790, 45 C. A. 270, 106 Fed. 258, 188 U. S. 56) | 282 243, 261, 268, 1457, 1541, 1542 |
| Grove v. Grove (98 Fed. 865) | 282 | v. Continental Ins. Co. (16 Fed. 718) | 427 |
| Groves v. Sentell (153 U. S. 465, 14 Sup. Ct. 898) | 1319, 1324 | v. Continental Ins. Co. (20 Fed. 844) | 473 |
| Grubb v. Clayton (Fed. Cas. No. 5, 849a) | 816 | v. Continental L. Ins. Co. (12 Fed. 369) | 409 |
| Guaranty Trust etc. Co. v. Green Cove Springs etc. R. Co. (189 U. S. 137, 11 Sup. Ct. 512) | 891, 396, 1630, 1631, 1634, 1637 | v. Duncan (Fed. Cas. No. 5,914) | 1548 |
| Guardian Trust Co. v. Kansas etc. R. Co. (146 Fed. 340, 78 C. C. A. 615) | 15 | v. Frost (99 U. S. 389) | 1581, 1585, 1592 |
| Gubbins v. Laughtenschiager (75 Fed. 615) | 226, 670, 695 | v. Hardon (87 C. C. A. 240, 93 Fed. 747) | 1457, 1541, 1542 |
| Gudger v. Western North Carolina R. Co. (21 Fed. 81) | 9, 826 | v. Tyler (104 Fed. 757) | 1542 |
| Gulf etc. R. Co. v. Washington (49 Fed. 847, 1 C. C. A. 286) | 213 | Hall v. Bridgeport Trust Co. (122 Fed. 170) | 1208 |
| Gulf Bag Co. v. Suttner (124 Fed. 467) | 1408, 1404 | v. Maltby (6 Price 240) | 127 |
| Gumbel v. Pitkin (124 U. S. 182, 8 Sup. Ct. 379) | 755 | v. Noyes (3 Bro. Ch. 483) | 507 |
| Gun v. Prior (Forrest 88 note, 1 Cox Ch. Cas. 197, 2 Dick. 657) | 507 | v. Sullivan R. Co. (Fed. Cas. No. 5,948) | 1681 |
| Gunby v. Armstrong (66 C. C. A. 627, 183 Fed. 417) | 750, 1488 | Hall etc. Co., <i>In re</i> (69 Fed. 425) | 1505, 1507, 1511 |
| Gunn v. Black (60 Fed. 151, 8 C. C. A. 534) | 1227 | <i>In re</i> (73 Fed. 527) | 1467, 1470, 1472 |
| v. Brinkley Car Works (66 Fed. 382, 13 C. C. A. 529) | 41 | Hall Signal Co. v. General R. etc. Co. (153 Fed. 907, 82 C. C. A. 658) | 1370 |
| v. Ewan (93 Fed. 80, 35 C. C. A. 218) | 1455, 1518, 1519, 1566 | Halsey v. Goddard (86 Fed. 25) | 249 |
| Gunnison v. Chicago etc. R. Co. (117 Fed. 629) | 1640 | v. Hurd (6 McLean 14) | 376 |
| Guppy v. Brown (4 Dall. 410) | 1042 | v. New Providence Tp. (3 Fed. 364) | 221 |
| Gutterson v. Lebanon Iron etc. Co. (151 Fed. 72) | 1564, 1566 | Halstead v. Buster (119 U. S. 341, 7 Sup. Ct. 276) | 660 |
| Haarmann etc. Co. v. Lenders (135 Fed. 420) | 714 | v. John C. Winston Co. (111 Fed. 85) | 1370 |
| Habich v. Folger (20 Wall. 1) | 409 | v. Manning (34 Fed. 565) | 284 |
| Hackettstown Nat. Bank v. Brewing Co. (74 Fed. 110, 20 C. C. A. 327) | 1629 | Halsted v. Forest Hill Co. (109 Fed. 820) | 1242, 1281, 1283, 1266 |
| Hagan v. Bindell (56 Fed. 696, 6 C. C. A. 86) | 1405 | Hamilton v. Baldwin (41 Fed. 429) | 1203 |
| v. Lucas (10 Pet. 400) | 1486 | v. Savannah etc. R. Co. (49 Fed. 412) | 326, 383 |
| v. Walker (14 How. 29) | 1649 | v. Southern Nevada Gold etc. Co. (33 Fed. 562) | 696, 1096 |
| Hagerman v. Moran (21 C. C. A. 242, 75 Fed. 97) | 1297 | v. State (32 Md. 352) | 1385 |
| Haggart v. Wilcinski (74 C. C. A. 176, 148 Fed. 22) | 1165 | Hamlyn v. Lee (1 Dick. 94) | 838 |
| Hagge v. Kansas City etc. R. Co. (104 Fed. 891) | 215 | Hammerschlag Mfg. Co. v. Judd (26 Fed. 292) | 785, 1020 |
| Haight v. Morris Aqueduct (4 Wash. C. C. 601, Fed. Cas. No. 5,902) | 482, 788, 1406 | Hammock v. Farmers' L. & T. Co. (105 U. S. 77) | 1378, 1471, 1628, 1653 |
| Haight etc. Co. v. Weiss (156 Fed. 828) | 54 | Hammond v. Cleaveland (23 Fed. 1) | 218 |
| Hair v. Burnell (106 Fed. 280) | 742 | v. Hopkins (148 U. S. 224, 12 Sup. Ct. 418) | 111, 119 |
| | | v. Hunt (Fed. Cas. No. 6,003, 4 B. & A. Pat. Cas. 111) | 505 |
| | | Hammond Elevator Co. v. Board of Trade (74 C. C. A. 430, 148 Fed. 292) | 1888, 1896, 1401 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|--|---|------------------------------------|
| Hammond Lumber Co. v. Sailors' Union (149 Fed. 577)..... | 1383, 1386, 1437, 1439, 1443 | Harper v. Holman (84 Fed. 222).... | 260 |
| Hampson v. Quayle (12 R. I. 508) | 671 | Harper Printing-Telegraph News Co. (128 Fed. 979)..... | 1547 |
| Hampton v. Phipps (108 U. S. 260) | 1631 | Harriman v. Northern Securities Co. (132 Fed. 464, <i>reversed</i> 194 U. S. 244) | 1361, 1366, 1367, 1372 |
| v. Truckee Canal Co. (19 Fed. 1) | 200 | Harrington v. Harrington (15 R. I. 341, 5 Atl. 502)..... | 474 |
| Hanchett v. Blair (41 C. C. A. 76, 100 Fed. 817) | 976 | v. Union Oil Co. (144 Fed. 235) | 1481, 1482, 1604 |
| Hancock v. Holbrook (112 U. S. 230) | 1207 | Harris v. Hardeman (14 How. 340) | 372 |
| Handeside v. Brown (1 Dick. 236) | 968 | v. Harris (3 Hare 450) | 606 |
| Handley v. Stutz (137 U. S. 366) | 216 | v. Wall (7 How. 693) | 1078 |
| Handy v. Cleveland etc. R. Co. (31 Fed. 696) | 1611 | Harrison v. Farmers' L. & T. Co. (94 Fed. 728, 36 C. C. A. 443) | 20, 817 |
| Hanford v. Davies (163 U. S. 273) | 180 | v. Graham (110 Fed. 896) | 1329, 1832 |
| Hanks Dental Asso. v. Tooth Crown Co. (194 U. S. 308, 309) | 1055 | v. Nixon (9 Pet. 483) | 104, 117, 938, 1162 |
| Hanley v. Coal Co. (110 Fed. 62) | 39 | v. Perea (168 U. S. 311, 18 Sup. Ct. 129) | 463, 1216 |
| v. Sweeny (190 Fed. 712, 48 C. C. A. 612) | 26 | v. Rowan (Fed. Cas. No. 6,140) | 534 |
| Hanlon v. Primrose (56 Fed. 600) | 114 | v. Rowan (4 Wash. C. C. 202, Fed. Cas. No. 6,143, 1 Dan. Ch. Pr. 219) | 303, 460, 567 |
| Hanna v. State Trust Co. (70 Fed. 2, 16 C. C. A. 586, 30 L.R.A. 201) | 1579 | v. Urann (Fed. Cas. No. 6,146) | 326 |
| Hannewinkle v. Georgetown (15 Wall. 547) | 44 | Hart v. Ten Eyck (2 Johns. Ch. 62) | 980 |
| Hannibal First Nat. Bank v. Smith (6 Fed. 215) | 319 | Harter v. Kernochnan (103 U. S. 562) | 351 |
| Hanrick v. Hanrick (153 U. S. 196) | 1207 | Hartford v. Bridgeport Trust Co. (148 Fed. 558) | 810 |
| Hapgood v. Hewitt (11 Fed. 422) | 192 | Hartford F. Ins. Co. v. Bonner etc. Co. (11 L.R.A. 623, 44 Fed. 151, 56 Fed. 378, 3 C. C. A. 524) | 213, 251 |
| Hardeman v. Harris (7 How. 726) | 444, 469 | Hartford Rubber Works Co. v. Consolidated etc. Co. (117 Fed. 1008) | 38 |
| Hardenbergh v. Ray (151 U. S. 112, 14 Sup. Ct. 305) | 178, 794 | Hartog v. Memory (116 U. S. 588) | 223, 541 |
| Hardin v. Boyd (113 U. S. 756, 5 Sup. Ct. 771) | 78, 144, 148, 151, 152, 652, 654, 666, 667 | Hartz v. Cleveland Block Co. (95 Fed. 681, 37 C. C. A. 227) | 519, 541, 544, 545, 546, 550 |
| v. Cass County (42 Fed. 652) | 207 | Harvey v. Raleigh etc. R. Co. (89 Fed. 115) | 205 |
| Harding v. Handy (11 Wheat. 103, 900, 926) | 1162 | v. Richmond etc. R. Co. (64 Fed. 19) | 100, 190, 235, 422, 576, 669 |
| Hardon v. Newton (Fed. Cas. No. 6,054) | 666 | v. Sellers (115 Fed. 757) | 497 |
| Hards v. Connecticut Mut. L. Ins. Co. (Fed. Cas. No. 6,055) | 1658 | Harwood v. Cincinnati etc. R. Co. (17 Wall. 78) | 111 |
| Hardt v. Heidweyer (152 U. S. 547, 14 Sup. Ct. 671) | 111, 569 | Haselton v. Florentine Marble Co. (94 Fed. 701) | 1633 |
| v. Liberty etc. Co. (27 Fed. 788) | 1857, 1860 | Hassall v. Wilcox (115 U. S. 598) | 216 |
| Hardwick v. American Can Co. (115 Tenn. 393, 1 L.R.A.(N.S.) 1029) | 1257 | Hatch v. Bancroft-Thompson Co. (67 Fed. 802, 2 Dan. Ch. Pr. 77) | 528, 531, 533, 590, 606, 610, 1467 |
| Harkness v. Hyde (98 U. S. 476, 403, 408) | 411 | v. Chicago etc. R. Co. (Fed. Cas. No. 6,204) | 1891 |
| Harkrader v. Wadley (172 U. S. 148, 19 Sup. Ct. 119) | 1467 | v. Ferguson (52 Fed. 833) | 1289 |
| Harland v. Bankers etc. Tel. Co. (32 Fed. 305) | 1204, 1205, 1537 | v. Ferguson (57 Fed. 966, <i>aff'd.</i> 33 L.R.A. 759, 68 Fed. 43, 15 C. C. A. 301) | 58, 899 |
| Harman v. Lewis (24 Fed. 580, 1244) | 1249 | | |
| Harmer v. Harris (1 Russ. 155) | 1211 | | |
| Harpending v. Reformed Dutch Church (16 Pet. 455) | 504 | | |
| Harper v. Dougherty (Fed. Cas. No. 6,087) | 974 | | |

[References are to pages.]

| | | | |
|---|-------------------------|---|-----------------------------------|
| Hatch v. Indianapolis etc. R. Co. (9 Fed. 859)..... | 895, 896 | Heath v. Erie R. Co. (8 Blatchf. 347, Fed. Cas. No. 6,306)..... | 434, 570, 571, 660 |
| v. White (2 Gall. 152, Fed. Cas. No. 6,209)..... | 1657 | v. Erie R. Co. (9 Blatchf. 316, Fed. Cas. No. 6,307)..... | 387, 388, 1119 |
| v. Willamet Iron Bridge Co. (27 Fed. 678)..... | 1419 | | |
| Hatfield v. Bushnell (1 Blatchf. 393, Fed. Cas. No. 6,211)..... | 749 | Heckman v. Mackey (32 Fed. 574)..... | 361, 362 |
| v. Cummings (142 Ind. 350, 39 N. E. 859)..... | 1589 | Hedlund v. Dewey (105 Fed. 541)..... | 35 |
| Hathaway v. Roach (2 Woodb. & M. 68)..... | 1189, 1191, 1192 | Hefner v. Northwestern L. Ins. Co. (123 U. S. 747, 8 Sup. Ct. 339)..... | 276, 277 |
| v. Roach (Fed. Cas. No. 6,213)..... | 1205 | Hegewisch v. Silver (140 N. Y. 414)..... | 1539 |
| Hat-Sweat Mfg. Co. v. Porter (46 Fed. 757)..... | 208 | Heldritter v. Elizabeth Oilcloth Co. (112 U. S. 294, 5 Sup. Ct. 139)..... | 1467, 1469, 1503 |
| v. Waring (46 Fed. 87)..... | 800 | Heine v. Levee Com'rs (19 Will. 655)..... | 264 |
| Havemeyers Sugar Refining Co. v. Compagnie Transatlantica (43 Fed. 90)..... | 1134 | Helena etc. Smelting Co. <i>In re</i> (48 Fed. 609)..... | 91 |
| Haverhill Gaslight Co. v. Barker (109 Fed. 694)..... | 46 | Hemingway v. Stansell (106 U. S. 399)..... | 784 |
| Hawes v. Oakland (104 U. S. 450)..... | 294 | Henderson v. Carbondale etc. Co. (140 U. S. 25, 11 Sup. Ct. 691)..... | 408, 410, 1232, 1288 |
| Hawkins v. Crook (2 P. Wms. 556)..... | 952 | v. Goode (49 Fed. 887)..... | 751 |
| v. Glenn (131 U. S. 319)..... | 1543 | Hendrickson v. Bradley (29 C. C. A. 303, 85 Fed. 508)..... | 484, 486 |
| v. Peirce (79 Fed. 452)..... | 403 | Hendryx v. Fitzpatrick (19 Fed. 811)..... | 1452 |
| Hawley v. Wolverton (5 Paige 522)..... | 126 | v. Perkins (52 C. C. A. 435, 114 Fed. 801)..... | 491, 1162, 1168, 1267, 1291, 1292 |
| Haycraft v. U. S. (22 Wall. 92)..... | 297 | v. Perkins (59 C. C. A. 286, 123 Fed. 268)..... | 1149 |
| Hayden v. Drury (3 Fed. 782, reversed on other ground, 111 U. S. 223)..... | 1661 | Hennessey v. Budde (82 Fed. 541)..... | 1441 |
| v. Manning (1 Sup. Ct. 617, 106 U. S. 586)..... | 221 | Hennessey v. May (189 U. S. 35)..... | 204 |
| v. Thompson (36 U. S. App. 361, 71 Fed. 60, 17 C. C. A. 592)..... | 268 | v. Molse (23 Sup. Ct. 534, 189 U. S. 35)..... | 204 |
| 41, 244, 245, 262, 588, 589, 590 | | v. Richardson Drug Co. (23 Sup. Ct. 532, 189 U. S. 25, 103 Off. Gaz. 1681)..... | 204 |
| Hayes v. Dayton (8 Fed. 702)..... | 258, | Henning v. Boyle (112 Fed. 397)..... | 1037, 1052, 1106 |
| v. Dayton (20 Fed. 690)..... | 1248, | Henry v. La Compagnie Generale Transatlantique etc. (96 Fed. 497)..... | 180 |
| Hayman v. Keally (3 Cranch C. C. 325, Fed. Cas. No. 6,265)..... | 422 | v. Travelers' Ins. Co. (34 Fed. 258)..... | 857 |
| Hays v. Fidelity etc. Co. (112 Fed. 872, 50 C. C. A. 569)..... | 1414 | v. Travelers' Ins. Co. (35 Fed. 15)..... | 1187 |
| Hayward v. Eliot Nat. Bank (Fed. Cas. No. 6,273)..... | 974 | v. Travelers' Ins. Co. (45 Fed. 299)..... | 662, 702, 722, 1277 |
| v. Nordberg Mfg. Co. (85 Fed. 4, 29 C. C. A. 488)..... | 206, | Henshaw v. Salt River Valley Canal Co. (6 Ariz. 151, 54 Pac. 577)..... | 257 |
| Hazard v. Durant (12 R. I. 100)..... | 947 | v. Wells (9 Hump. 568)..... | 1475 |
| v. Durant (19 Fed. 471)..... | 326, | Hepbourn v. Auld (1 Cranch 321)..... | 1200 |
| v. Durant (25 Fed. 26)..... | 516, | Hepburn v. Ellsey (2 Cranch 445)..... | 186 |
| Hazleton etc. Co. v. Citizens St. R. Co. (72 Fed. 325)..... | 78, 712, 715, 717, 721, | Herbert v. Rainey (54 Fed. 248)..... | 209 |
| H. B. Clafin Co. v. Furtick (119 Fed. 429)..... | 738 | Herdaman v. Lewis (9 Fed. 553)..... | 924, 925, 927, 929 |
| Head v. Hargrave (105 U. S. 45)..... | 876 | | |
| v. Porter (70 Fed. 498)..... | 731 | | |
| Headrick v. Larson (81 C. C. A. 378, 152 Fed. 94)..... | 581 | | |
| Healy v. Prevost (Fed. Cas. No. 6,297)..... | 206 | | |
| Eq. Prac. Vol. III.—117. | | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|------------------------|--|------------------|
| Herman, <i>In re</i> (50 Fed. 517)..... | 1519 | Hinchman <i>v.</i> Kelley (54 Fed. 68, 4 C. C. A. 189, <i>affirming</i> 49 Fed. 492) | 568 |
| Hershberger <i>v.</i> Blewett (55 Fed. 170)..... | 805, 806, 808, 812 | Hinckley, <i>In re</i> (3 Fed. 556)..... | 1603 |
| Hershfield <i>v.</i> Griffith (18 Wall. 657)..... | 67 | <i>v.</i> Gilman etc. R. Co. (100 U. S. 153) | 1510, 1568, 1605 |
| Hervey <i>v.</i> Illinois Midland R. Co. (28 Fed. 169)..... | 1482, 1594 | <i>v.</i> Pfister (83 Wis. 64, 53 N. W. 21) | 1476 |
| Hewitt <i>v.</i> Storey (39 Fed. 719)..... | 326 | Hinde <i>v.</i> Wattler (1 McLean 110) .. | 1099 |
| <i>v.</i> Story (39 Fed. 158)..... | 225 | Hinde <i>v.</i> Keith (6 C. C. A. 231, 57 Fed. 10) | 403 |
| <i>v.</i> Story (30 L.R.A. 265, 12 C. C. A. 250, 64 Fed. 524) .. | 328 | Hipp <i>v.</i> Babin (19 How. 271) ..27, | 40, 53 |
| Heyman <i>v.</i> Uhlman (34 Fed. 686) 400, 421, 422, 483, 484, 486 | 486 | Hitchcock <i>v.</i> Shoninger Melodeon Co. (Fed. Cas. No. 6,537) | 1098 |
| Hibernia Ins. Co. <i>v.</i> St. Louis etc. Transp. Co. (10 Fed. 596, <i>affirmed</i> 7 Sup. Ct. 550, 120 U. S. 166) .. | 313 | Hitner <i>v.</i> Suckley (2 Wash. C. C. 465, Fed. Cas. No. 6,548) | 383, 387 |
| Hicklin <i>v.</i> Marco (56 Fed. 549, 6 C. C. A. 13)..... | 320, 654 | Hite <i>v.</i> Jenkins (185 U. S. 155) ..1470, | 1504, 1507 |
| <i>v.</i> Marco (64 Fed. 609) .. | 1228 | Hoare <i>v.</i> Bremeridge (L. R. 8 Ch. 26) .. | 50 |
| Hickox <i>v.</i> Holladay (12 Sawy. 214, 29 Fed. 238)..... | 1503, 1504 | Hobbs <i>v.</i> McLean (117 U. S. 567) .. | 1219 |
| Hicks <i>v.</i> Ferdinand (20 Fed. 111) .. | 1247 | <i>v.</i> Norton (1 Vern. 187) .. | 926 |
| <i>v.</i> Jennings (4 Fed. 855) .. | 1641 | Hobhouse <i>v.</i> Courtney (12 Sim. 140, 6 Jur. 28) | 382 |
| <i>v.</i> Michael (15 Cal. 116) .. | 1363 | Hobson <i>v.</i> McArthur (16 Pet. 194) .. | 140, 144, 708 |
| <i>v.</i> Otto (17 Fed. 539) .. | 655, 673, 695 | Hodge <i>v.</i> Hudson River R. Co. (Fed. Cas. No. 6,560) | 1371 |
| <i>v.</i> Otto (85 Fed. 728) .. | 1247 | <i>v.</i> North Missouri R. Co. (1 Dill. 104, Fed. Cas. No. 6,561) .. | 567, 571 |
| Higbie <i>v.</i> Hopkins (Fed. Cas. No. 6,466) .. | 974 | Hodgson <i>v.</i> Bowerbank (5 Cranch 303) | 191, 204 |
| Higgins, <i>In re</i> (27 Fed. 448) .. | 1501 | Hoe <i>v.</i> Jamieson (166 U. S. 395) .. | 183 |
| Higginson <i>v.</i> Chicago etc. R. Co. (102 Fed. 197, 42 C. C. A. 254) .. | 708, 1396 | <i>v.</i> Scott (87 Fed. 220) | 861 |
| Highland Ave. etc. R. Co. <i>v.</i> Columbian Equipment Co. (168 U. S. 630) .. | 1498 | Hoffman <i>v.</i> Knox (1 C. C. A. 535, 50 Fed. 484) .. | 1242, 1251, |
| Hildebrand <i>v.</i> Beasley (7 Heisk. 121) .. | 637 | 1261, 1262, 1264, 1280 | |
| Hill <i>v.</i> Bonaffon (Fed. Cas. No. 6,488) .. | 560 | <i>v.</i> Pearson (8 U. S. App. 19, 1 C. C. A. 535, 50 Fed. 484) .. | 1262 |
| <i>v.</i> Gordon (45 Fed. 276) .. | 375 | <i>v.</i> Shields (4 W. Va. 490) .. | 391 |
| <i>v.</i> Hite (85 Fed. 268, 29 C. C. A. 549, <i>affirming</i> 79 Fed. 826) .. | 479, 480, 1628, 1637 | Hoge <i>v.</i> Eaton (185 Fed. 411) .. | 640 |
| <i>v.</i> Kuhlman (87 Fed. 498, 31 C. C. A. 87) .. | 748 | <i>v.</i> Richmond etc. R. Co. (93 U. S. 1) | 1143 |
| <i>v.</i> Mendenhall (21 Wall. 453) .. | 409 | Hogg <i>v.</i> Hoag (107 Fed. 807) .. | 635 |
| <i>v.</i> Northern Pac. R. Co. (113 Fed. 914, 51 C. C. A. 544) .. | 273 | Hohorst <i>v.</i> Hamburg-American Pack- et Co. (38 Fed. 278) | 407 |
| <i>v.</i> Phelps (101 Fed. 650, 41 C. C. A. 569) .. | 1164, 1256, 1261, 1263 | <i>v.</i> Howard (37 Fed. 97) | 731 |
| <i>v.</i> Ryan Grocery Co. (23 C. C. A. 624, 78 Fed. 21) .. | 974, 1167 | Holbrook <i>v.</i> Black (Fed. Cas. No. 6,590) | 434 |
| <i>v.</i> The Triumph (Fed. Cas. No. 6,500) .. | 1198 | Holden <i>v.</i> Utah etc. Machinery Co. (82 Fed. 209) | 208 |
| Hilliker <i>v.</i> Hale (117 Fed. 224, 54 C. C. A. 252) .. | 1540, 1541 | Holgate <i>v.</i> Eaton (116 U. S. 33) .. | 647 |
| Hillman <i>v.</i> Newington (57 Cal. 66) .. | 257 | Holladay Case, The (27 Fed. 830) .. | 976, 1090, 1098 |
| Hilton <i>v.</i> Dickinson (108 U. S. 165, 2 Sup. Ct. 424) .. | 208, 200 | Holland <i>v.</i> Challen (110 U. S. 15, 3 Sup. Ct. 495) .. | 16, 18, 41 |
| <i>v.</i> Guyott (42 Fed. 249) .. | 596, 604 | <i>v.</i> Ryan (17 Fed. 1) | 181 |
| <i>v.</i> Guyot (159 U. S. 113) .. | 597 | Holland Trust Co. <i>v.</i> International etc. Co. (85 Fed. 865, <i>affirming</i> 81 Fed. 422, 26 C. C. A. 469) .. | 1472 |

[References are to pages.]

| | | | |
|---|----------------------------|--|--|
| Holliday v. Schultzeberge (57 Fed. 660) | 1044 | Horn v. Pere Marquette R. Co. (151 Fed. 626) | 770, 771, 1464, 1475, 1478, 1497, 1500, 1501, 1548, 1553 |
| Hollingsworth v. Duane (Wall. Sr. 77, Fed. Cas. No. 6,616) | 1424 | Hornbuckle v. Stafford (111 U. S. 389) | 79 |
| v. Duane (Wall. Sr. 141, Fed. Cas. No. 6,617) | 1436 | v. Toombs (18 Wall. 648) | 66, 67, 140 |
| Hollins v. Brierfield Coal Co. (150 U. S. 371, 14 Sup. Ct. 127) | 20, 42, 53, 62 | Horne v. George H. Hammond Co. (155 U. S. 393, 15 Sup. Ct. 167) | 191 |
| Holly Mfg. Co. v. New Chester Water Co. (48 Fed. 879) | 330 | Horner-Gaylord Co. v. Miller (147 Fed. 295) | 253, 254, 742 |
| Holmes, In re (73 C. C. A. 491, 142 Fed. 391) | 1268 | Hornthall v. Keary (9 Wall. 560) | 187, 1205 |
| Holmes v. Oldham (1 Hughes 76, Fed. Cas. No. 6,643) | 25 | Horsburg v. Baker (1 Pet. 282) | 736, 1403 |
| v. Sherwood (16 Fed. 725) | 1126, 1540 | Horsford v. Gudger (35 Fed. 388, reversed 10 Sup. Ct. 1069, 186 U. S. 639) | 568 |
| Holt v. Bergevin (60 Fed. 1) | 217 | Horat v. Merkley (59 Fed. 502) | 209 |
| v. Rogers (8 Pet. 420) | 1167 | Hosmer v. Jewett (Fed. Cas. No. 6,713) | 570 |
| Holton v. Quinn (65 Fed. 450) | 430, 441, 454, 575, 608 | Hostetter Co. v. Comerford (99 Fed. 834) | 1247 |
| v. Wallace (66 Fed. 409, 77 Fed. 61, 23 C. C. A. 71) | 274, 290, 321 | v. E. G. Lyons Co. (99 Fed. 734) | 510 |
| Home Ins. Co. v. Nobles (63 Fed. 641) | 205, 659, 1371, 1872, 1877 | v. Van Vorst (62 Fed. 600) | 1203 |
| v. Stanchfield (1 Dill. 424, Fed. Cas. No. 6,660) | 50, 1125 | Houghton v. Jones (1 Wall. 702) | 1063 |
| v. Virginia-Carolina Co. (109 Fed. 681) | 748 | House v. Mullen (22 Wall. 42) | 808, 660, 817 |
| Home Land etc. Co. v. McNamara (49 C. C. A. 642, 111 Fed. 822) | 897 | Houston v. Filer etc. Co. (48 C. C. A. 457, 104 Fed. 168) | 1206 |
| Hone v. Dillon (29 Fed. 465) | 749 | Houston First Nat. Bank v. Ewing (103 Fed. 168, 48 C. C. A. 150) | 1474, 1577, 1586, 1599, 1649 |
| Hood v. Tremont First Nat. Bank (29 Fed. 55) | 1461 | Hovey v. Elliott (167 U. S. 409) | 945, 955 |
| Hooe v. Jamieson (166 U. S. 395) | 187 | v. McDonald (109 U. S. 150) | 825, 1234, 1394 |
| Hook v. Bosworth (12 C. C. A. 208, 64 Fed. 448) | 1485 | v. Stevens (3 Woodb. & M. 17) | 1196, 1199 |
| v. Payne (14 Wall. 252) | 808 | Howard v. American Diary etc. Co. (Fed. Cas. No. 6,753) | 1202 |
| Hooper v. Scheimer (28 How. 235) | 8 | v. DeCordova (177 U. S. 609, 20 Sup. Ct. 817) | 659 |
| Hooven etc. Co. v. Featherstone (49 C. C. A. 229, 111 Fed. 81) | 817 | v. La Crosse etc. R. Co. (Fed. Cas. No. 6,780) | 1615 |
| Hop Bitters Mfg. Co. v. Warner (28 Fed. 577) | 1230 | v. Milwaukee etc. R. Co. (101 U. S. 849) | 1306 |
| Hope v. Hope (4 De G. M. & G. 328, 19 Beav. 237) | 382 | v. Scott (50 Vt. 48) | 919 |
| Hope Ins. Co. v. Boardman (5 Cranch 57) | 195 | v. Stillwell etc. Mfg. Co. (139 U. S. 199) | 1098 |
| Hopkins v. Grimshaw (165 U. S. 858) | 11 | Howards v. Selden (5 Fed. 465) | 742 |
| Hopkirk v. Page (Fed. Cas. No. 6,697) | 315 | Howe etc. Co. v. Haugan (140 Fed. 182) | 168, 247, 269, 813 |
| Hoppenstedt v. Fuller (71 Fed. 90, 17 C. C. A. 623) | 191 | Howell v. Western R. Co. (94 U. S. 463) | 1626, 1645, 1647, 1648 |
| Hopper v. Covington (118 U. S. 151) | 561 | Hoxie v. Carr (1 Sumn. 178, Fed. Cas. No. 6,802) | 308 |
| Horn v. Detroit Dry Dock Co. (150 U. S. 610) | 540, 545 | Hoyt, In re (119 Fed. 987) | 1190 |
| v. Lockhart (17 Wall. 570) | 818 | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|-----------------------------------|---|-------------------------|
| Hoyt v. Hammeken (14 How. 346).. | 1010, 1042 | Hunter v. Marlboro (2 Woodb. & M. 168, Fed. Cas. No. 6,908).. | 1106, 1203, 1244, 1244 |
| Hubbard v. Manhattan Trust Co. (30 C. C. A. 520, 87 Fed. 51) | 111, 313, 330, 568, 571, 580, 600 | v. Robbins (117 Fed. 920).. | 34, 326 |
| v. Tod (171 U. S. 502, 19 Sup. Ct. 14) | 1107 | v. U. S. (5 Pet. 178)..... | 666 |
| Hubbell v. De Land (14 Fed. 471).. | 506 | Huntington v. Laidley (79 Fed. 865) | 535, 537, 538, 539, 539 |
| v. Lankeaw (63 Fed. 881).736, | 815 | v. Little Rock etc. Co. (16 Fed. 908) | 1283 |
| Hubinger v. Central Trust Co. (84 Fed. 788, 36 C. C. A. 494)..... | 16 | v. New York (118 Fed. 688).... | 1355, 1369 |
| Hudson v. Bishop (38 Fed. 680).... | 380 | v. Palmer (104 U. S. 482).. | 290, 304 |
| v. Randolph (18 C. C. A. 402, 66 Fed. 216) | 40, 588, 636 | v. Saunders (120 U. S. 78).... | 476, 1123 |
| v. Guestier (7 Cranch 1)..... | 1232 | Huntley, <i>In re</i> (29 C. C. A. 468, 85 Fed. 889)..... | 1427 |
| v. Wood (119 Fed. 764)....11, | 256, 278 | Huntreas v. Epsom (15 Fed. 732)... | 1190 |
| Huff v. Bidwell (81 C. C. A. 43, 151 Fed. 563) | 643, 1479 | Hunfeld v. Automaton Piano Co. (98 Fed. 788) | 402 |
| v. Hutchinson (14 How. 586).. Higgins v. York Buildings Co. (2 Atk. 44) | 334 | Hurd v. Case (32 Ill. 45)..... | 637 |
| Hugh v. McRea (Chase 466)..... | 1476 | Harst v. M'Neill (1 Wash. C. C. 70) | 226 |
| Hughes, <i>Ex p.</i> (114 U. S. 548, 5 Sup. Ct. 1008) | 1191 | Hurt v. Hollingsworth (100 U. S. 100) | 62 |
| Hughes v. Blake (6 Wheat. 453).543, | 974 | Harter v. Robbins (21 Ala. 585).... | 945 |
| v. Blake (Fed. Cas. No. 6,845) 974 | | Hussey v. Bradley (3 Blatchf. 210)... | 1190 |
| v. Edwards (9 Wheat. 489).... | | Hutchins v. Denziloe (1 Hag. Cons. 181) | 986 |
| 1627, 1640 | | Hutchinson v. American Palace Car Co. (104 Fed. 182)....1458, 1464, | 1466, 1478 |
| v. Green (84 Fed. 833, 28 C. C. A. 537) | 16, 554 | v. Beckham (55 C. C. A. 333, 118 Fed. 899)..... | 265 |
| v. Northern Pac. R. Co. (18 Fed. 106) | 170, 1852 | v. Brock (11 Mass. 119)..... | 282 |
| Huldekooper, <i>Ex p.</i> (55 Fed. 709).... | 1504 | v. Green (6 Fed. 837)..... | 1467 |
| Huldekooper v. Locomotive Works (90 U. S. 258) | 1585 | Huttig Sash etc. Co. v. Fuelle (143 Fed. 363)....876, 913, 1438, 1438, 1441 | |
| Hulsecamp v. Teel (Fed. Cas. No. 6,862) | 207 | Hutton v. Joseph Bancroft etc. Co. (77 Fed. 481) | 353 |
| Humane Bit Co. v. Barnet (117 Fed. 316) | 365 | v. Joseph Bancroft etc. Co. (83 Fed. 17)..... | 562, 579 |
| Humboldt v. Avery (110 Fed. 485).. Hume v. Pittsburgh etc. R. Co. (8 Biss. 31, Fed. Cas. No. 6,865).... | 25 | v. Star Slide Seat Co. (60 Fed. 747) | 114 |
| Humes v. Scruggs (94 U. S. 22).... | 481 | Hyams v. Federal Coal etc. Co. (82 C. C. A. 324, 152 Fed. 970)....998, 1142 | |
| Humiston v. Stainthorp (2 Wall. 106) | 1193 | Hyde v. Forster (1 Dick. 102)..... | 382 |
| Humphrey, <i>In re</i> (2 Blatchf. 228)... | 1103 | Hyslop v. Hoppock (5 Ben. 447, Fed. Cas. No. 6,988)....371, 411 | |
| Humphreys v. Ingledon (1 P. Wms. 752) | 116 | v. Hoppock (5 Ben. 533, Fed. Cas. No. 6,989)..... | 383 |
| Hunt v. Danforth (2 Curt. C. C. 592, Fed. Cas. No. 6,887)....37, | 289 | | I. |
| v. Fisher (29 Fed. 801)..... | 1290 | Ibbottson v. Rhodes (2 Vern. 554) 931 | |
| v. Howes (21 C. C. A. 356, 74 Fed. 657) | 1206 | Idaho etc. Land Co. v. Bradbury (182 U. S. 509, 10 Sup. Ct. Rep. 177) 935 | |
| v. Oliver (Fed. Cas. No. 6,894) 646, | 872 | Ido v. Crooby (104 Fed. 582)....790, 1462 | |
| v. Penrice (17 Beav. 525)....593, | 598, | v. Troricht etc. Co. (58 C. C. A. 341, 118 Fed. 187)....120, 1197 | |
| v. Rousmaniere (2 Mason 342, Fed. Cas. No. 6,898)....651, | 656 | Illinois, The (Brown, Adm. 18).... 70 | |
| v. Wickliffe (2 Pet. 201)..... | 317 | | |

TABLE OF CASES.

1861

[References are to pages.]

| | |
|---|---|
| Illinois Cent. R. Co. v. Adams (180 U. S. 28, 21 Sup. Ct. 251) 175 | Insurance Co. of North America v. Svendsen (74 Fed. 346) 208, 411, 661, 668 |
| v. Caffrey (128 Fed. 770)..... 263 | |
| v. Chicago etc. R. Co. (26 Fed. 477) 180 | |
| Illinois Steel Co. v. Putnam (15 C. C. A. 556, 68 Fed. 515)....1469, 1470, 1497 | |
| Illinois Trust etc. Bank v. Doud (105 Fed. 123, 52 L.R.A. 481, 44 C. C. A. 389)1575, 1589 | |
| Illinois Trust etc. Co. v. Arkansas City (34 L.R.A. 518, 22 C. C. A. 171, 76 Fed. 271)..... 26 | |
| Imperial Refining Co. v. Wyman (3 L.R.A. 503, 88 Fed. 574)....199, 224, 541 | |
| Imbusch v. Farwell (1 Black 566) .. 318 | |
| Independent Baking Powder Co. v. Boorman (137 Fed. 995)..... 1027 | |
| Indiana v. Alleghany Oil Co. (85 Fed. 870) 185 | |
| v. Glover (155 U. S. 513, 15 Sup. Ct. 186)..... 334 | |
| v. Lake Erie etc. R. Co. (85 Fed. 1) 742 | |
| Indiana etc. R. Co. v. Liverpool etc. Ins. Co. (109 U. S. 168)..... 642 | |
| Indiana Mfg. Co. v. Koehne (188 U. S. 681)..... 45 | |
| Indianapolis etc. Co. v. Consolidated Traction Co. (125 Fed. 247)....1450, 1452 | |
| Indianapolis Gas Co. v. Indianapolis (82 Fed. 245)....1345, 1366, 1375 | |
| v. Indianapolis (90 Fed. 169) .. 1121, 1126, 1127 | |
| Indianapolis Water Co. v. American etc. Co. (75 Fed. 972)..... 1426, 1450 | |
| Indian Land etc. Co. v. Shoenfelt (88 C. C. A. 196, 185 Fed. 484) .. 38, 53, 817 | |
| India Rubber Co. v. Consolidated etc. Co. (117 Fed. 354)..... 38 | |
| India Rubber Comb Co. v. Phelps (8 Blatchf. 85, Fed. Cas. No. 7,025) 695, 1247 | |
| Industrial etc. Guaranty Co. v. Electrical Supply Co. (58 Fed. 732, 7 C. C. A. 471) ..221, 1206, 1207, 1347, 1354, 1405, 1410 | |
| Ingersoll v. Coram (127 Fed. 418) 249 | |
| v. Coram (186 Fed. 689)..... 1162 | |
| Ingle v. Jones (9 Wall. 486)..... 1012 | |
| Inglee v. Coolidge (2 Wheat. 368) .. 1205 | |
| Inman v. New York etc. Water Co. (131 Fed. 997, citing 1 Dan. Ch. Pr. (6th Am. ed.) 339)..... 271 | |
| In re, see names of parties. | |
| Insley v. U. S. (150 U. S. 512) .. 53 | |
| J. | |
| Jackson, In re (9 Fed. 498)..... 1404 | |
| v. Allen (132 U. S. 27)..... 198 | |
| v. Ashton (8 Pet. 148)..... 95, 96, 187, 190, 191 | |
| v. Ashton (11 Pet. 229)..... 104 | |
| v. Railway Co. (18 L. J. Ch. 91) 114 | |
| v. Simmons (39 C. C. A. 514, 98 Fed. 768).....632, 639, 646 | |
| v. Twentyman (2 Pet. 136).... 203 | |
| Jackson etc. Co. v. Burlington etc. R. Co. (29 Fed. 474)..... 1653 | |
| Jacob Brandow, The (33 Fed. 160) .. 1062 | |
| Jacobs v. Van Sickle (61 C. C. A. 598, 127 Fed. 62)..... 972, 974 | |
| Jaffrey v. Brown (29 Fed. 476).... 900, 911, 912 | |

TABLE OF CASES.

[References are to pages.]

| | | | | |
|--|---------------|------|---|------------------------------|
| Jahn v. Champagne Lumber Co. (147 Fed. 631) | 148, 253, 255 | 380 | John Hancock etc. Co. v. Houpt (113 Fed. 572)..... | 919 |
| v. Champagne Lumber Co. (152 Fed. 669)..... | 516, 596, | 597 | John L. Nelson etc. Co. <i>In re</i> (149 Fed. 590)..... | 1504, 1553 |
| v. Champagne Lumber Co. (157 Fed. 407)..... | 102 | | Johns v. Wilson (180 U. S. 440, 21 Sup. Ct. 445)..... | 1652 |
| James v. Gray (1 L.R.A. (N.S.) 321, 181 Fed. 401, 68 C. C. A. 385).... | 3, | 58 | Johnson v. Ball (14 N. J. Eq. 426)..... | 289 |
| Jarboe v. Tempier (38 Fed. 216).... | 1660 | | v. Christian (125 U. S. 642, 8 Sup. Ct. 1135)..... | 743, 748 |
| Jarvis v. Crozier (98 Fed. 753).... | 285, | 303 | v. Florida etc. R. Co. (18 Fed. 821)..... | 505 |
| Jayne v. Loder (153 Fed. 739, 82 C. C. A. 625)..... | 1192, | 1196 | v. Foos Mfg. Co. (141 Fed. 73, 72 C. C. A. 105).... | 1194, 1197 |
| Jeffries v. Laurie (27 Fed. 195).... | 1298 | | v. Ford (109 Fed. 501).... | 350, 571 |
| Jenkins v. Eldredge (3 Story Fed. Cas. No. 7,267).... | 705, | | v. Harmon (94 U. S. 371)..... | 924, 936, 937, 938, 939, 999 |
| 708, 816, 871, 1242, 1248, | | | v. Munday (44 C. C. A. 64, 104 Fed. 594)..... | 39 |
| 1245, 1246, 1247, 1250, | 1810 | | v. Powers (13 Fed. 315)..... | 253 |
| v. Greenwald (1 Bond 126).... | 73 | | v. Powers (130 U. S. 156).... | 283 |
| v. Pye (12 Pet. 241).... | 455 | | v. Richmond Beach Imp. Co. (63 Fed. 493)..... | 372 |
| v. York Cliffs Imp. Co. (110 Fed. 807).... | 281, 373, | 376, | v. Southern etc. Assoc. (132 Fed. 540)..... | 1504 |
| | 393, | 407 | v. Southern Bldg. etc. Assoc. (99 Fed. 646)..... | 1486, 1502, 1558 |
| Jenks v. Brewster (96 Fed. 625).... | 742 | | v. Swanke (128 Wis. 68, 5 L.R.A. (N.S.) 1048)..... | 50 |
| Jennes v. Landes (84 Fed. 78).... | 153, | 154, | v. Towsley (13 Wall. 72).... | 14, |
| | | 208 | v. Waters (111 U. S. 640, 4 Sup. Ct. 619).... | 239, |
| Jenness v. Citizens Nat. Bank (110 U. S. 52).... | 200 | | | 410, 1290 |
| Jennings v. Dolan (29 Fed. 861).... | 896, | 904 | v. Watkins (40 Fed. 187).... | 1202 |
| v. Menaugh (118 Fed. 612).... | 1051 | | Johnson etc. Signal Co. v. Union Switch etc. Co. (43 Fed. 881)... | |
| Jenson v. Norton (29 U. S. App. 121, 12 C. C. A. 608, 64 Fed. 662).... | 1375 | | 625, 642 | |
| Jerman v. Stewart (12 Fed. 274).... | 1189, | 1190 | Johnson Steel etc. Co. v. North Branch Steel Co. (48 Fed. 191) | |
| Jerome v. McCarter (94 U. S. 734).... | 1275, | 1545 | 1105, 1107, 1112, | 1114 |
| Jesse Williamson, Jr., The (108 U. S. 305).... | 200 | | Johnston v. Trippie (33 Fed. 530)... | 205 |
| Jesson v. Brewer (1 Dick. 371).... | 1178 | | Jonas H. French, The (119 Fed. 462)..... | 1549 |
| Jessup v. Illinois Cent. R. Co. (36 Fed. 735).... | 322, | 791 | Jones, <i>Ez p.</i> (164 U. S. 691)..... | 196 |
| Jesup v. Illinois Cent. R. Co. (43 Fed. 483).... | 648, | 811 | v. Allen (29 C. C. A. 318, 85 Fed. 523)..... | 1414 |
| v. Railroad Co. (44 Fed. 663).... | 1473 | | v. Andrews (10 Wall. 327).... | 190, 192, 401, |
| Jesus College v. Glbbe (1 Y. & C. Exch. 446).... | 458 | | 747 | |
| Jewett v. Cunard (Fed. Cas. No. 7,310).... | 326 | | v. Bolles (9 Wall. 384).... | 115, |
| Jewett Car Co. v. Kirkpatrick Constr. Co. (107 Fed. 622).... | 51 | | 813 | |
| J. I. Case Plow Works v. Finks (26 C. C. A. 46, 81 Fed. 529).... | 1549 | | v. Brittan (1 Woods 687, Fed. Cas. No. 7,455).... | 486, |
| J. L. Mott Iron Works v. Standard Mfg. Co. (48 Fed. 345).... | 1031 | | 815 | |
| Jobbins v. Montague (5 Ben. 422, 6 N. B. R. 509).... | 411 | | v. Central Trust Co. (78 Fed. 568, 19 C. C. A. 569).... | 1558 |
| John D. Park etc. Co. v. Bruen (133 Fed. 807).... | 553 | | v. Davis (16 Ves. Jr. 262).... | 599 |
| v. Bruen (147 Fed. 884).... | 176, | | v. Dimes (130 Fed. 688).... | 1374 |
| | 446, 447, | 472, | v. Green (1 Wall. 330).... | 42 |
| | 476 | | v. Hillis (100 Fed. 355).... | 544, |
| | | | 546 | |
| | | | v. Jones (3 Atk. 217).... | 1151 |
| | | | v. Lamar (39 Fed. 585).... | 898, |
| | | | 900 | |
| | | | v. League (18 How. 76).... | 218, 226, |
| | | | 502 | |

TABLE OF CASES.

1863

[References are to pages.]

| | | | |
|---|---------------------------------|---|------------------|
| Jones <i>v.</i> McCormick Harvesting Mach. Co. (82 Fed. 295, 27 C. C. A. 188)..... | 207 | Kansas etc. R. Co. <i>v.</i> Atchison etc. R. Co. (112 U. S. 414).... | 184 |
| <i>v.</i> McMaster (20 How. 8).... | 5 | <i>v.</i> Morgan (76 Fed. 429, 21 C. C. A. 468)..... | 285 |
| <i>v.</i> Missouri etc. Co. (75 C. C. A. 681, 144 Fed. 765).... | 274, | <i>v.</i> Payne (1 C. C. A. 188, 49 Fed. 114)..... | 1884, 1896 |
| <i>v.</i> Mutual Fidelity Co. (128 Fed. 506) | 6, 18 | Kansas City <i>v.</i> National Waterworks Co. (65 Fed. 691)..... | 850 |
| <i>v.</i> Schell (8 Blatchf. 79).... | 1190 | Kansas City etc. R. Co. <i>v.</i> Daughtry (188 U. S. 301)..... | 196 |
| <i>v.</i> Schiaback (81 Fed. 274).... | 1545 | <i>v.</i> Stoner (51 Fed. 649, 2 C. C. A. 487) | 1091 |
| <i>v.</i> Slauson (83 Fed. 632).... | 568 | Kansas City First Nat. Bank <i>v.</i> Bush (85 Fed. 539, 29 C. C. A. 333) | 1097 |
| <i>v.</i> Smith (14 Ill. 229).... | 687 | Kansas Loan etc. Co. <i>v.</i> Electric R. etc. Co. (108 Fed. 702)..... | 876, 905 |
| <i>v.</i> Smith (40 Fed. 314).... | 1459 | Kaufman <i>v.</i> Kennedy (25 Fed. 785).... | 403 |
| <i>v.</i> The St. Nicholas (49 Fed. 671) | 1548 | Kearny, <i>Ez p.</i> (7 Wheat. 38).... | 1425 |
| <i>v.</i> Van Doren (180 U. S. 684, 9 Sup. Ct. 685) | 188, 189, | Keasbey, <i>Re</i> (180 U. S. 221).... | 238 |
| Jordan <i>v.</i> Agawam Woollen Co. (3 Clif. 239, Fed. Cas. No. 7,516) | 78, 1190 | Keasbey etc. Co. <i>v.</i> American Mag- nesia etc. Co. (149 Fed. 439).... | |
| <i>v.</i> Wells (3 Woods 527, Fed. Cas. No. 7,525)..... | 1547 | 1221, 1222 | |
| Jorgenson <i>v.</i> Young (68 C. C. A. 222, 136 Fed. 378).... | 1266, 1278 | Keasbey etc. Co. <i>v.</i> Philip Cary Mfg. Co. (113 Fed. 432)..... | 278 |
| Joseph Dry Goods Co. <i>v.</i> Hecht (57 C. C. A. 64, 120 Fed. 760).... | 351, 1858, 1854, 1458, 1470, | Keeler <i>v.</i> Atchison etc. R. Co. (84 C. C. A. 528, 92 Fed. 545)..... | 1523 |
| Josey <i>v.</i> Rogers (13 Ga. 478).... | 642 | Keene <i>v.</i> Meade (3 Pet. 1).... | 1045, |
| Josselyn <i>v.</i> Phillips (27 Fed. 481)... | 1206, 1207 | 1085, 1092 | |
| Jourlmon <i>v.</i> Ewing (85 Fed. 108, 29 C. C. A. 41 denying a bill to review 80 Fed. 604, 20 C. C. A. 23).... | 1261, 1265, 1273, | Keene <i>v.</i> Wheatley (Fed. Cas. No. 7,644) | 688 |
| Joy <i>v.</i> St. Louis (188 U. S. 1, 11 Sup. Ct. 248)..... | 820 | Keep <i>v.</i> Indianapolis etc. R. Co. (10 Fed. 454) | 798 |
| <i>v.</i> Wirtz (1 Wash. 517, Fed. Cas. No. 7,554)..... | 328 | Keihl <i>v.</i> South Bend (36 L.R.A. 228, 22 C. C. A. 618, 76 Fed. 921).... | 1550 |
| Judd <i>v.</i> Bankers' etc. Tel. Co. (81 Fed. 182)..... | 1467 | Keith <i>v.</i> Alger (124 Fed. 32, 59 C. C. A. 552)..... | 1260, 1272, 1287 |
| Judson, <i>Ez p.</i> (8 Blatchf. 89).... | 1108 | Kell <i>v.</i> Trenchard (146 Fed. 246)... | |
| <i>v.</i> Courier Co. (25 Fed. 705).... | 656 | 1194, 1210, 1228 | |
| <i>v.</i> Macon County (2 Dill. 213, Fed. Cas. No. 7,568).... | 218 | Keller <i>v.</i> Ashford (188 U. S. 610)... | |
| Julian <i>v.</i> Central Trust Co. (198 U. S. 98, 24 Sup. Ct. 399).... | 15, | 36, 327 | |
| Jumeau <i>v.</i> Brooks (109 Fed. 853, 48 C. C. A. 897)..... | 188 | Kelley <i>v.</i> Boettcher (29 C. C. A. 14, 85 Fed. 55).... | 120, 165, |
| Juneau Bank <i>v.</i> McSpedan (5 Biss. 64) | 408 | 166, 167, 253, 262, 269, 313, | |
| K. | | 347, 1121 | |
| Kaempfer <i>v.</i> Taylor (78 Fed. 795)... | 1192 | <i>v.</i> Boettcher (89 Fed. 125).... | |
| Kahn <i>v.</i> Starrels (186 Fed. 597, 69 C. C. A. 871)..... | 1197 | 1459, 1461 | |
| Kamm <i>v.</i> Stark (1 Sawy. 547, Fed. Cas. No. 7,604).... | 382, 385, | <i>v.</i> Diamond Drill etc. Co. (69 C. C. A. 599, 136 Fed. 855, 188 Fed. 838)..... | 1285 |
| Kanawha Lodge <i>v.</i> Swann (37 W. Va. 176)..... | 637 | <i>v.</i> Diamond Drill etc. Co. (142 Fed. 868)..... | 1279 |
| Kane <i>v.</i> Luckman (181 Fed. 609)... | 1209 | Kellner <i>v.</i> Mutual L. Ins. Co. (43 Fed. 623)..... | 528, 532, 588 |
| | | Kellom <i>v.</i> Easley (1 Dill. 281, 2 Abb. (U. S.) 559, Fed. Cas. No. 7,668)... | 1277 |
| | | Kelsey <i>v.</i> Hobby (18 Pet. 269).... | 79, |
| | | 624, 901 | |
| | | <i>v.</i> Pennsylvania R. Co. (14 Blatchf. 89, Fed. Cas. No. 7,679) | 409 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|----------------|--|--|
| Kemp v. National Bank (48 C. C. A. 213, 109 Fed. 48)..... | 1162 | Kilburn v. Ingersoll (67 Fed. 46)..... | 1371 |
| Kempe v. Kennedy (5 Cranch 186)..... | 176 | Kilgore v. Norman (119 Fed. 1006)..... | 134, 249, 1400 |
| Kenah v. The John Markee, Jr. (8 Fed. 45)..... | 966 | Kilgour v. National Bank (97 Fed. 693)..... | 911 |
| Kendig v. Dean (97 U. S. 423)..... | 816 | Killian v. Ebbinghaus (110 U. S. 568, 4 Sup. Ct. 232)..... | 27, 28, 40, 1318, 1320, 1321, 1322 |
| Kemicott v. Wayne County (16 Wall. 452)..... | 1639 | Kimball v. Atchison etc. Co. (46 Fed. 888)..... | 1370 |
| Kennedy v. Cresswell (101 U. S. 641)..... | 542, 547, | v. Goodhura (32 Mich. 10)..... | 1476 |
| v. Georgia Bank (8 How. 586)..... | 659, 704, 1266 | Kimberly v. Arms (129 U. S. 512, 9 Sup. Ct. 355)..... | 848, 852, 897, 911, 917, 918 |
| v. Gibson (8 Wall. 498)..... | 267, 1538 | v. Arms (40 Fed. 548)..... | 1260, 1261, 1266, 1268, 1273, 1275, 1280, 1281, 1283, 1284 |
| v. Indianapolis etc. R. Co. (2 Flipp. 707, 3 Fed. 99)..... | 1503 | King v. Dundee Mortg. etc. Co. (28 Fed. 33)..... | 1259 |
| v. St. Paul etc. R. Co. (2 Dall. 448)..... | 1503, 1504 | v. Force (2 Cranch C. C. 208, Fed. Cas. No. 7,791)..... | 983 |
| v. Solar Refining Co. (69 Fed. 715)..... | 196 | v. McLean Asylum (28 L.R.A. 784, 64 Fed. 331, 12 C. C. A. 145)..... | 286 |
| Kent v. Lake Superior Ship Canal R. etc. Co. (144 U. S. 75, 12 Sup. Ct. 650)..... | 1166 | v. Thompson (110 Fed. 319, 49 C. C. A. 59)..... | 1654 |
| Kenton Furnace R. etc. Co. v. McAlpin (5 Fed. 737)..... | 273 | v. Vaughan (2 Doug. 516)..... | 1442 |
| Kentucky, The (4 Blatchf. 448, Fed. Cas. No. 7,717)..... | 70 | v. Williamson (80 Fed. 170, 25 C. C. A. 355)..... | 1402, 1405 |
| Kentucky Bank v. Stone (88 Fed. 383)..... | 44 | v. Wilson (Fed. Cas. No. 7,810)..... | 206 |
| Kentucky Silver Min. Co. v. Day (2 Sawy. 488, 14 Fed. Cas. No. 7,719)..... | 98, 269, 402, | v. Wooster (4 C. C. A. 519, 54 Fed. 612)..... | 1504 |
| Keeney v. Knipe (46 Fed. 309)..... | 205 | King Bridge Co. v. Otee County (120 U. S. 225)..... | 176, 200, 660 |
| Keokuk etc. Co. v. Scottland County (152 U. S. 318, 14 Sup. Ct. 605, affirming 41 Fed. 305)..... | 729 | Kingsbury v. Buckner (134 U. S. 650, 10 Sup. Ct. 638)..... | 302, 303, 387, 626, 1284 |
| Kerp v. Michigan Lake Shore R. Co. (Fed. Cas. No. 7,727)..... | 409, | Kinne v. Lant (68 Fed. 436)..... | 403 |
| Kerr v. Moon (9 Wheat. 565)..... | 283 | Kinsman v. Parkhurst (18 How. 289)..... | 897 |
| v. South Park Com'rs (117 U. S. 379, 6 Sup. Ct. 801)..... | 932, | Kircher v. Murray (54 Fed. 626)..... | 8 |
| v. Watts (8 Wheat. 350)..... | 936 | Kirk v. Du Bois (28 Fed. 460)..... | 731 |
| Kerrison v. Stewart (93 U. S. 155)..... | 315 | v. Du Bois (46 Fed. 486)..... | 1197 |
| Kershaw v. Thompson (4 Johns. Ch. 609)..... | 1304 | v. Hamilton (102 U. S. 68)..... | 51 |
| Kessler v. Enaley Co. (129 Fed. 397)..... | 121 | v. Milwaukee Dust Collector Mfg. Co. (28 Fed. 505)..... | 1425 |
| Ketchum v. Driggs (Fed. Cas. No. 7,735)..... | 567 | Kirker v. Owings (98 Fed. 490, 39 C. C. A. 132)..... | 1557, 1566, 1571, 1621 |
| v. Duncan (96 U. S. 659)..... | 1654 | Kirkland, <i>In re</i> (Fed. Cas. No. 7,842)..... | 70 |
| Keyes v. Pueblo Smelting etc. Co. (31 Fed. 560)..... | 924 | Kirkley v. Burton (5 Madd. 378)..... | 169 |
| Keyser v. Farr (105 U. S. 266)..... | 1231 | Kirkpatrick v. Eastern Milling etc. Co. (135 Fed. 146, 137 Fed. 387, 69 C. C. A. 579)..... | 832 |
| Kibbe v. Benson (17 Wall. 626)..... | 372 | v. Love (Ambl. 589)..... | 969 |
| v. Dunn (5 Biss. 233, Fed. Cas. No. 7,753)..... | 1840 | v. White (4 Wash. C. C. 595, Fed. Cas. No. 7,850)..... | 534, 535 |
| v. Thompson (5 Biss. 226, Fed. Cas. No. 7,754)..... | 1840 | Kirwan v. Murphy (189 U. S. 35)..... | 25 |
| Kimball v. Masterson (Fed. Cas. No. 7,758)..... | 1405 | Kissinger Iron Co. v. Bradford Belt- ing Co. (59 C. C. A. 221, 123 Fed. 91)..... | 1223, 1278, 1286, 1287 |
| Kilbourne v. Sunderland (130 U. S. 505, 9 Sup. Ct. 594)..... | 28, 53, | Kittel v. Augusta etc. R. Co. (78 Fed. 855)..... | 1485, 1540, 1541 |

TABLE OF CASES.

1865

[References are to pages.]

| | | | |
|---|------------------|---|----------------------|
| Kittredge v. Claremont Bank (3 Story 590, Fed. Cas. No. 7,858) | 502, 673 | Kurtz v. Brown (81 C. C. A. 498, 152 Fed. 372)..... | 1120 |
| v. Claremont Bank (1 Woodb. & M. 244, Fed. Cas. No. 7,859) | 441, 443, 473 | Kyle, <i>Ez p.</i> (67 Fed. 306)..... | 179 |
| v. Race (92 U. S. 116)..... | 1196, 1197, 1222 | | L. |
| Klein v. Fleetford (35 Fed. 98)..... | 1402 | Layette County v. U. S. (112 U. S. 217, 5 Sup. Ct. 108)..... | 742 |
| v. Southern Pac. Co. (140 Fed. 213) | 1178 | La Bourgogne (75 C. C. A. 647, 144 Fed. 781) | 912 |
| Klank v. Byrne (143 Fed. 1008)..... | 178, 493 | Lacassagne v. Chapuis (144 U. S. 119, 12 Sup. Ct. 659)..... | 817, 1343 |
| Klever v. Seawall (12 C. C. A. 681, 65 Fed. 393, reversing 12 C. C. A. 653, 65 Fed. 373)..... | 44 | Lackawanna etc. Co. v. Farmers' Loan etc. Co. (176 U. S. 298) | 1588, 1589 |
| Kneass v. Schuylkill Bank (1 Fisher Pat. Cas. 1, 4 Wash. C. C. 106, Fed. Cas. No. 7,876)..... | 1201, 1202 | Lackett v. Rumbaugh (45 Fed. 23) | 408 |
| Kneeland v. American Loan etc. Co. (136 U. S. 89)..... | 1529, 1585 | Lacov, <i>In re</i> (74 C. C. A. 130, 142 Fed. 960) | 1604 |
| Knickerbocker Trust Co. v. Penacook Mfg. Co. (100 Fed. 814)..... | 1628 | La Croix v. May (15 Fed. 236)..... | 570 |
| Knight v. Ogden (3 Tenn. Ch. 409)..... | 792 | Lady Bryan Min. Co. <i>In re</i> (Fed. Cas. No. 7,980) | 1380 |
| Knode v. Williamson (17 Wall. 586)..... | 1086, 1087 | Lafayette County v. Neely (21 Fed. 738) | 100, 296, 1516, 1564 |
| Knott v. Evening Post Co. (124 Fed. 342) | 1470 | v. Wonderly (92 Fed. 313, 34 C. C. A. 380) | 742 |
| Knox v. Columbia Liberty Iron Co. (42 Fed. 378)..... | 1286 | Lafayette Ins. Co. v. French (18 How. 404) | 196 |
| v. Summers (3 Cranch 496)..... | 409 | Lafferty Mfg. Co. v. Acme R. Signal Co. (74 C. C. A. 521, 148 Fed. 321) | 1275, 1278 |
| Knox County v. Harshman (132 U. S. 14)..... | 1895 | Lake County v. Dudley (173 U. S. 243) | 223 |
| v. Harshman (133 U. S. 152) | 1292 | v. Platt (25 C. C. A. 87, 79 Fed. 567) | 244 |
| Knox Rock-Blasting Co. v. Bairdon Stone Co. (87 Fed. 909)..... | 505 | v. Schradsky (79 Fed. 1, 38 C. C. A. 17) | 221 |
| Knoxville v. Africa (77 Fed. 501, 23 C. C. A. 252)..... | 1358, 1396 | Lake Erie etc. R. Co. v. Bailey (61 Fed. 404) | 1443 |
| Koehler v. Black River etc. Co. (2 Black 715)..... | 144 | v. Fremont (34 C. C. A. 625, 92 Fed. 721) | 911 |
| Kohn v. McNulta (147 U. S. 288, 13 Sup. Ct. 298)..... | 980, 985 | v. Indianapolis Nat. Bank (65 Fed. 880) | 960 |
| Koning v. Bayard (2 Paine 251, Fed. Cas. No. 7,924)..... | 77 | v. Felton (103 Fed. 227, 43 C. C. A. 189) | 1359, 1396, 1502 |
| Kontz v. Northern Bank (16 Wall. 196) | 1582 | Lake St. El. R. Co. v. Ziegler (39 C. C. A. 431, 99 Fed. 114) | 335 |
| Korn v. Wiesbusch (33 Fed. 50)..... | 505, 546 | Lakin v. Sierra Buttes Gold Min. Co. (25 Fed. 387) | 505 |
| Kreager v. Judd (5 Fed. 27)..... | 1202 | Lalance etc. Co. v. Haberman Mfg. Co. (93 Fed. 197) | 846 |
| Krick v. Jansen (52 Fed. 823)..... | 115 | Lamb v. Ewing (54 Fed. 269, 4 C. C. A. 320) | 743 |
| Krippendorf v. Hyde (110 U. S. 276, 4 Sup. Ct. 27)..... | 49, 754, 794 | v. Parkman (Fed. Cas. No. 8-019) | 76 |
| Kromer v. Everett Imp. Co. (110 Fed. 22) | 758 | v. Starr (Deady 350, Fed. Cas. No. 8,021) | 514, 515, 559 |
| Kuhn v. Morrison (75 Fed. 81)..... | 743 | Lamm v. Parrot (111 Fed. 241) | 253 |
| Kunkel v. Brown (99 Fed. 593, 39 C. C. A. 665)..... | 208 | Lancaster v. Asheville St. R. Co. (90 Fed. 129) | 1459 |
| Kursheedt Mfg. Co. v. Naday (108 Fed. 918)..... | 1191 | v. Lancaster (6 Sims. 480) | 1074 |

TABLE OF CASES.

[References are to pages.]

| | |
|---|---|
| Land Co. v. Elkins (20 Fed. 545).. | Leavitt v. Cowles (Fed. Cas. No. 8,- 330, 1369 |
| Lansdale v. Smith (106 U. S. 391, 1 Sup. Ct. 350) | 111, 568 |
| Land Title etc. Co. v. Asphalt Co. (120 Fed. 996) | 1611 |
| v. Asphalt Co. (127 Fed. 1, 62 C. C. A. 23)..... | 18, 1630, 1631 |
| Lane v. Jordan (116 Fed. 623, 54 C. C. A. 79) | 1381 |
| v. Newdigate (10 Ves. Jr. 182) .. | 1843 |
| Langdon v. Branch (87 Fed. 449, 2 L.R.A. 120) | 347 |
| v. Goddard (Fed. Cas. No. 8,- 060) | 64 |
| v. Goddard (3 Story 18, Fed. Cas. No. 8,061) | 186 |
| v. Sherwood (124 U. S. 74) .. | 8 |
| Lanier v. Nash (7 Sup. Ct. 919, 121 U. S. 404) | 221 |
| Lanning v. Dolph (Fed. Cas. No. 8,- 078) | 205 |
| v. Lockett (10 Fed. 541) | 221 |
| v. Osborne (79 Fed. 657) | 750 |
| Lansdale v. Smith (106 U. S. 391) .. | 504 |
| Lant v. Kinne (75 Fed. 636, 21 C. C. A. 466) | 793 |
| v. Manley (75 Fed. 627, 21 C. C. A. 457, reversing 71 Fed. 7) | 659 |
| Larimer etc. Co. v. Water Supply etc. Co. (7 Colo. App. 225, 42 Pac. 1020) | 674 |
| Larkins v. Paxton (8 Myl. & K. 820) Lascassagne v. Chapuis (144 U. S. 119) | 1218 |
| Laskey v. Newton Min. Co. (50 Fed. 634) | 39 |
| v. Newtown Min. Co. (56 Fed. 628) | 1458 |
| Latham v. Chafee (7 Fed. 520, 523) 554, | 1162 |
| Latta v. Kilbourn (150 U. S. 524) 908 | 1597 |
| Laughlin v. U. S. Rolling Stock Co. (64 Fed. 25)..... | 1578 |
| Laurens, The (Fed. Cas. No. 8,122) | 799 |
| Lautz v. Gordon (28 Fed. 264) .. | 632 |
| La Vega v. Lapsley (1 Woods 428, Fed. Cas. No. 8,128) | 78 |
| Lavis v. Consumers' Brewing Co. (106 Fed. 485) | 472 |
| Lawrence v. Bowman (1 McAll. 419) | 687 |
| v. Richmond (1 Jac. & W. 241) .. | 1386 |
| Lea v. Deakin (18 Fed. 514) | 1412 |
| Leadville Coal Co. v. McCreery (141 U. S. 475, 12 Sup. Ct. 28) .. | 840, 1471 |
| Leavenworth v. Pepper (32 Fed. 718) .. | 440 |
| Leavenworth County v. Chicago etc. R. Co. (25 Fed. 219) | 505 |
| Leavitt v. Cowles (Fed. Cas. No. 8,- 171) | 188 |
| Leddel v. Starr (19 N. J. Eq. 159) .. | 1475 |
| Ledoux v. La Bee (83 Fed. 761) .. | 1504, 1575 |
| Lee v. Pennsylvania Traction Co. (105 Fed. 403) | 1585, 1588 |
| v. Simpson (37 Fed. 12, 2 L.R. A. 659) | 1871 |
| v. Terbell (40 Fed. 44) | 1544 |
| v. Watson (1 Wall. 337) | 208 |
| v. Willock (6 Ves. Jr. 605) .. | 877 |
| Leeds v. Cameron (3 Sumn. 488) .. | 1203 |
| v. Evans (99 Fed. 28) | 1041 |
| v. Marine Ins. Co. (2 Wheat. 380) | 960, 971 |
| Lee Injector Mfg. Co. v. Penberthy Injector Co. (109 Fed. 954, 48 C. C. A. 760) | 1190, 1191 |
| Lefavour v. Whitman Shoe Co. (65 Fed. 785) | 1436 |
| Leighton v. Young (18 L.R.A. 266, 10 U. S. App. 298, 3 C. C. A. 176, 52 Fed. 489) | 40 |
| Lehigh Coal etc. Co. v. Central R. Co. (Fed. Cas. No. 8,218) | 1540 |
| Lehigh Min. etc. Co. v. Kelly (160 U. S. 327) | 227 |
| Lehigh Zinc etc. Co. v. New Jersey Zinc etc. Co. (43 Fed. 545) .. | 241, 269 |
| Lehman v. McQuown (31 Fed. 188) .. | 1414 |
| Lengel v. American Smelting etc. Co. (110 Fed. 19) | 281 |
| Lennon, Esq. v. (12 C. C. A. 184, 64 Fed. 320) | 1443 |
| In re (166 U. S. 548, 17 Sup. Ct. 658) .. | 1343, 1378, 1381, 1386, 1427, 1428 |
| Lenox v. Notrebe (Hempst. 225, Fed. Cas. No. 8,246b) | 1460 |
| v. Notrebe (Fed. Cas. No. 8,- 246c) | 301, 971 |
| v. Prout (3 Wheat. 520) .. | 974, 984 |
| Leo v. Union Pac. R. Co. (17 Fed. 273) | 1859 |
| Leonard v. Cutler-Hammer Co. (154 Fed. 920) | 1014 |
| v. Ozark Land Co. (115 U. S. 465) | 1394, 1395 |
| Leonard etc. Co. v. Bank of America (30 C. C. A. 221, 86 Fed. 502) .. | 965 |
| Leslie v. Brown (32 C. C. A. 556, 90 Fed. 171) | 1413, 1416 |
| v. Leslie (84 Fed. 70) | 269 |
| v. Urbana (56 Fed. 762, 6 C. C. A. 111) | 1284 |
| Less v. English (85 Fed. 471, 29 C. C. A. 275) | 208, 1206 |
| Lester v. Stevens (29 Ill. 181) | 581 |
| Letters Rogatory, In re (36 Fed. 306) .. | 1059 |
| Leverich v. Mobile (122 Fed. 549) .. | 1420 |

[References are to pages.]

| | | | |
|--|------------------------|---|------------------------------------|
| Levi v. Evans (57 Fed. 677, 6 C. C. A. 500) | 410 | Livingston v. Story (11 Pet. 351) | 190, 218, 502, 503, 608 |
| Leviston v. French (45 N. H. 21) | 1099 | Lloyd v. Chesapeake etc. R. Co. (65 Fed. 851) | 1486 |
| Levy v. Fitzpatrick (15 Pet. 167) | 231 | v. Johnes (9 Ves. Jr. 37) | 719 |
| v. Shreveport (28 Fed. 209) | 183 | v. Pennie (50 Fed. 4) | 1026, 1028, 1114 |
| L. E. Waterman Co. v. Lockwood (128 Fed. 174) | 1190 | Lock v. Foote (4 Sim. 182) | 986 |
| Lewis v. American Naval Stores Co. (119 Fed. 391) | 1465, 1469, | Lockhart v. Horn (8 Woods 542) | 911 |
| v. Baird (3 McLean 56, Fed. Cas. No. 8,316) | 588, 599 | Lockhead v. Berkeley Springs etc. Co. (40 W. Va. 558) | 161 |
| v. Clark (129 Fed. 570, 64 C. C. A. 138) | 1542 | Lockwood v. Cleveland (20 Fed. 164) | 1246 |
| v. Cocks (23 Wall. 466) | 27, | Loewenstein v. Biernbaum (Fed. Cas. No. 8,461a) | 1328, 1329, 1332, 1333, 1334, 1338 |
| v. Loper (47 Fed. 259) | 245 | Logan v. Patrick (5 Cranch 288) | 409, 742 |
| v. Shainwald (48 Fed. 500) | 1828, 1833, 1835, 1336 | London v. Perkins (3 Bro. P. C. 602) | 281 |
| Lewisburg Bank v. Sheffey (140 U. S. 445, 11 Sup. Ct. 755) | 1161, 1241 | London etc. Bank v. Horton (61 C. C. A. 515, 126 Fed. 593) | 1165, 1166 |
| Leworne v. Mexican Int. Imp. Co. (38 Fed. 620) | 274 | Lonergan v. Illinois Cent. R. Co. (55 Fed. 550) | 197 |
| Libby v. Norris (142 Mass. 246, 7 N. E. 918) | 261 | Longworth v. Taylor (1 McLean 514, Fed. Cas. No. 8,491) | 379, 682, 684 |
| Lichtenauer v. Cheney (8 Fed. 876) | 674 | Lonsdale Co. v. Molen (2 Cliff. 538) | 848 |
| Lichtenfels v. Phillips (53 Fed. 153) | 1201 | Lord v. Kellett (2 Myl. & K. 1) | 380 |
| Liddle v. Cory (7 Blatchf. 1) | 1448 | Lord Cottenham v. Holt (4 Myl. & C. A. 635) | 78 |
| Liggett v. Glenn (51 Fed. 381, 2 C. C. A. 286) | 1627 | Lorillard v. Standard Oil Co. (2 Fed. 902) | 289, 459 |
| Lillenthal v. McCormick (117 Fed. 89, 54 C. C. A. 475) | 746, 1200 | Loring v. Marsh (2 Cliff. 311, Fed. Cas. No. 8,514) | 798 |
| v. Washburn (8 Fed. 707) | 542 | Lorman v. Clarke (2 McLean 588) | 19 |
| Lindeberg v. Howard (77 C. C. A. 23, 146 Fed. 467) | 1414 | Louden etc. Co. v. Montgomery (96 Fed. 232) | 258 |
| Linder v. Lewis (1 Fed. 378) | 948, 1282 | Louis v. Brown Tp. (109 U. S. 162) | 1169 |
| v. Lewis (4 Fed. 318) | 1229 | Louisiana Bank v. Whitney (121 U. S. 284, 7 Sup. Ct. 897) | 855 |
| Lindsay v. First Nat. Bank (156 U. S. 485) | 5, 62, 66 | Louisiana State Lottery Co. v. Clarke (16 Fed. 20) | 1315, 1324 |
| Linforth, <i>In re</i> (87 Fed. 386) | 1661 | Louisville etc. R. Co. v. Letson (2 How. 497, 558) | 196 |
| Linn v. Green (17 Fed. 407) | 109 | v. Ohio Valley etc. Co. (57 Fed. 42) | 51 |
| L'Invincible (1 Wheat. 254) | 299 | v. Palms (109 U. S. 253) | 561 |
| Lipke, <i>In re</i> (98 Fed. 970) | 1327, 1328, 1829, 1337 | v. Wilson (138 U. S. 501) | 1574, 1593 |
| Lippincott v. Shaw Carriage Co. (84 Fed. 570) | 1210 | Louisville Home Tel. Co. v. Cumberland etc. Co. (49 C. C. A. 524, 111 Fed. 667) | 1396 |
| Litchfield, <i>In re</i> (18 Fed. 863) | 1425 | Louisville Trust Co. v. Cincinnati (22 C. C. A. 384, 76 Fed. 298) | 1471, 1545 |
| Litchfield v. Ballou (114 U. S. 190, 5 Sup. Ct. 280) | 57 | v. Stone (46 C. C. A. 299, 107 Fed. 305) | 44, 179 |
| v. Register (9 Wall. 575) | 26 | Loveridge v. Larned (7 Fed. 294) | 1155, 1199 |
| Littell v. Erie R. Co. (105 Fed. 539) | 192 | Lovering v. Heard (1 Cranch C. C. 349) | 361 |
| Little v. Giles (118 U. S. 596) | 227 | Low v. Blackford (87 Fed. 392, 31 C. C. A. 15) | 1649 |
| Little Rock Junction R. Co. v. Burke (66 Fed. 83, 18 C. C. A. 341) | 15, 1289, 1290 | | |
| Little Rock Water Works Co. v. Barrett (103 U. S. 516) | 1485, 1688 | | |
| Little York Gold-Washing etc. Co. v. Keyes (96 U. S. 199) | 176, 180 | | |
| Liverpool etc. Inv. Co. v. Clunie (88 Fed. 160) | 261, 277 | | |
| Livingston v. Story (1 Pet. 351) | 187 | | |
| v. Story (9 Pet. 632) | 569, 686 | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|----------------------|--|------------|
| Lowe <i>v.</i> The Benjamin (Fed. Cas. No. 8,565) | 1205 | McClaskey <i>v.</i> Barr (42 Fed. 609) | 791 |
| Lowell Mfg. Co. <i>v.</i> Whittall (71 Fed. 515) | 1200 | <i>v.</i> Barr (45 Fed. 151) | 876 |
| Lowenfeld <i>v.</i> Curtis (72 Fed. 106) | 1405 | <i>v.</i> Barr (47 Fed. 165) | 1075 |
| Lowenstein <i>v.</i> Glidewell (5 Dill. 325, Fed. Cas. No. 8,575) | 387, 645, 648, 811 | <i>v.</i> Barr (79 Fed. 412) | 362 |
| Lownsdale <i>v.</i> Gray's Harbor Boom Co. (117 Fed. 983) | 198 | McCloskey <i>v.</i> Barr (38 Fed. 165) | |
| <i>v.</i> Portland (Deady 1, 1 Oregon 381, Fed. Cas. No. 8,578) | 465 | 501, 514, 516, 520, 521, 534, 542 | |
| Lowrey <i>v.</i> Kusworm (66 Fed. 539) | 1052, 1107 | <i>v.</i> Cobb (Fed. Cas. No. 8,702) | |
| Lowry <i>v.</i> Tile etc. Co. (98 Fed. 817) | 232, 236, 401 | 191, 192, 409 | |
| <i>v.</i> U. S. (19 C. C. A. 256, 72 Fed. 698) | 1084, 1085 | <i>v.</i> DuBois (9 Fed. 38) | 1246 |
| Luther <i>v.</i> Borden (7 How. 1) | 24, 25 | McCollum <i>v.</i> Eager (2 How. 61) | 13 |
| <i>v.</i> Schooner Merritt Hunt (Newb. Adm. 4, Fed. Cas. No. 8, 610) | 1078 | McComb <i>v.</i> Chicago etc. R. Co. (7 Fed. 426, 10 Blatchf. 69) | 1128 |
| Luxfer Prison Patents Co. <i>v.</i> Elkins (99 Fed. 29) | 1191 | McConihay <i>v.</i> Wright (121 U. S. 201, 7 Sup. Ct. 940) | 30 |
| Lyman <i>v.</i> Milton (44 Cal. 630) | 99 | McConnell <i>v.</i> Dennis (153 Fed. 547) | 323 |
| Lyman Ventilating Co. <i>v.</i> Southard (12 Blatchf. 406) | 361, 362 | McCormack <i>v.</i> James (36 Fed. 14) | 860 |
| Lynch <i>v.</i> Burt (67 C. C. A. 305, Fed. 417) | 1167 | McCormick <i>v.</i> Chamberlin (11 Paige 543) | 474 |
| Lyon <i>v.</i> Tallmadge (14 Johns. 501) | 1147 | <i>v.</i> Jerome (3 Blatchf. 486, Fed. Cas. No. 8,721) | 1385, 1387 |
| <i>v.</i> Tonawanda (98 Fed. 361) | 1373 | <i>v.</i> McDonald (110 Fed. 50) | 1170 |
| Iyster <i>v.</i> Stickney (12 Fed. 609) | 706, 1403 | <i>v.</i> Walters (134 U. S. 41) | 231 |
| M | | McCoy <i>v.</i> Lemons (Fed. Cas. No. 8,730a) | 778 |
| McArthur <i>v.</i> Scott (118 U. S. 340) | 308, 340 | <i>v.</i> McCoy (9 W. Va. 443) | 391 |
| Macartney <i>v.</i> Graham (2 Russ. & M. 353) | 1199 | <i>v.</i> Rhodee (11 How. 181) | 977, 978 |
| Macauley <i>v.</i> White Sewing Mach. Co. (9 Fed. 698) | 1450 | McCutchen <i>v.</i> Hileary (1 Cranch C. C. 173) | 361 |
| McCabe <i>v.</i> Mathews (40 Fed. 338) | 568 | McDonald <i>v.</i> Salem etc. Co. (81 Fed. 577) | 521, 594 |
| McCarley <i>v.</i> McGhee (108 Fed. 494) | 1618 | <i>v.</i> Seligman (81 Fed. 753) | 749, 750 |
| McCarthy <i>v.</i> American Thread Co. (143 Fed. 678) | 1203 | McDonald <i>v.</i> Smalley (1 Pet. 620) | |
| <i>v.</i> Bunker Hill etc. Coal Co. (147 Fed. 981) | 1417, 1418 | 138, 225 | |
| McGav <i>v.</i> Lamar (12 Fed. 367) | 104 | McDonald <i>v.</i> Whitney (39 Fed. 466) | 1266 |
| McClannah <i>v.</i> Davis (8 How. 170) | 117, 561 | McDonnell <i>v.</i> Eaton (18 Fed. 710) | |
| McClaskey <i>v.</i> Barr (40 Fed. 559) | 134, 440, 1122, 1126 | 319, 664 | |
| | | McElroy <i>v.</i> Swope (47 Fed. 380) | 904 |
| | | McEwen <i>v.</i> Harriman Land Co. (138 Fed. 797, 71 C. C. A. 163) | 1538 |
| | | McFarland <i>v.</i> State Sav. Bank (129 Fed. 244) | 944, 955 |
| | | <i>v.</i> State Sav. Bank (182 Fed. 39) | 476 |
| | | McFerran <i>v.</i> Taylor (3 Cranch 270) | 984 |
| | | McGahan <i>v.</i> National Bank (156 U. S. 218, 15 Sup. Ct. 347) | 326 |
| | | McGavock <i>v.</i> Bell (3 Coldw. 521) | 348 |
| | | McGillivray <i>v.</i> Cladin (52 Fed. 657) | 403 |
| | | MacGinness <i>v.</i> Boston etc. Min. Co. (119 Fed. 96, 55 C. C. A. 648) | 535 |
| | | McGorragey <i>v.</i> O'Connor (87 Fed. 586, 31 C. C. A. 114) | |
| | | 431, 437, 461, 482, 498 | |
| | | McGourkey <i>v.</i> Toledo etc. R. Co. (146 U. S. 545, 13 Sup. Ct. 172) | 855 |
| | | McGraw <i>v.</i> Woods (96 Fed. 56) | 148 |
| | | McGregor <i>v.</i> Vermont Loan etc. Co. (104 Fed. 709, 44 C. C. A. 146) | |
| | | 537, 1282 | |

TABLE OF CASES.

1869

[References are to pages.]

| | |
|--|-------------------------|
| McGuire v. Briscoe (Fed. Cas. No. 8,818a) | 1208 |
| v. Pensacola City Co. (44 C. C. A. 670, 105 Fed. 677) | 39, 53 |
| McHenry v. New York etc. R. Co. (25 Fed. 114) | 1614 |
| M'Liver v. Wattles (9 Wheat. 650) | 1205 |
| Mackall v. Ratchford (82 Fed. 41) | 1443 |
| Mackay v. Gabel (117 Fed. 873) | 326 |
| McKee v. Lamon (159 U. S. 317) | 329 |
| McKenzie, <i>In re</i> (180 U. S. 551) | 1615 |
| v. Cowing (4 Cranch C. C. 479, Fed. Cas. No. 8,856) | 1330, 1331 |
| McKibben, <i>In re</i> (Fed. Cas. No. 8,859) | 788 |
| Mackintosh v. Flint etc. R. Co. (34 Fed. 582) | 722, 725 |
| McKnight v. McKnight (Fed. Cas. No. 8,867a) | 288 |
| McLaughlin v. People's R. Co. (21 Fed. 574) | 568 |
| v. Potomac Bank (7 How. 220) 926, 928, 935, 939 | 939 |
| McLean v. Clark (31 Fed. 501) | 221, 227 |
| v. Lafayette Bank (3 McLean 503, Fed. Cas. No. 8,887) | 1478 |
| v. Mayo (113 Fed. 106) | 1405 |
| McLeod, <i>Eg p.</i> (120 Fed. 130) | 1424 |
| v. Duncan (5 McLean 342) | 1425 |
| v. New Albany (66 Fed. 378, 13 C. C. A. 525) | 836, 1247 |
| McMicken v. Perin (18 How. 507) | 896, 1232, 1235, 1242 |
| v. U. S. (97 U. S. 204) | 308 |
| McMullen v. Ritchie (57 Fed. 104) | 109, 1137 |
| v. Ritchie (64 Fed. 253) | 1009, 1010 |
| McMullen Lumber Co. v. Strother (68 C. C. A. 433, 136 Fed. 295) | 1121 |
| McNamara v. Home Land etc. Co. (105 Fed. 202, reversed 49 C. C. A. 642, 111 Fed. 822) 891, 896 | 891, 896 |
| v. Provident Sav. L. Assur. Soc. (114 Fed. 910, 52 C. C. A. 530) | 1318, 1319, 1323, 1324 |
| McNeill v. McNeill (78 Fed. 834) | 1289, 1292 |
| McNiel, <i>Eg p.</i> (13 Wall. 296) | 16 |
| McNulta v. Lochridge (141 U. S. 327, 12 Sup. Ct. 11) | 1495, 1596, 1549 |
| McNutt v. Bland (2 How. 8) | 334 |
| Macon etc. Lumber Co., <i>In re</i> (112 Fed. 323) | 163 |
| Macon etc. R. Co. v. Gibson (85 Ga. 1, 11 S. E. 442) | 261 |
| McPherson v. Cox (96 U. S. 404) | 1223 |
| McRae v. Bowers Dredging Co. (86 Fed. 344) | 1505 |
| McTighe v. Keystone Coal Co. (99 Fed. 134, 39 C. C. A. 447) | 1654 |
| MacVeagh v. Denver City Water-works Co. (85 Fed. 74, 29 C. C. A. 33, 107 Fed. 18) | 516, 531 |
| MacVeigh v. U. S. (11 Wall. 259) | 304 |
| McVicar Reality Trust Co. v. Union R. Power etc. Co. (136 Fed. 678) | 1641 |
| McWhirter v. Halsted (24 Fed. 828) | 1315, 1316 |
| Maeder v. Buffalo Bill's Wild West Co. (132 Fed. 280) | 295, 584, 566, 570 |
| Maffet v. Quine (95 Fed. 109, 93 Fed. 347) | 211, 1249 |
| Magic Ruffle Co. v. Elm City Co. (Fed. Cas. No. 8,950) | 905 |
| Magniac v. Thomson (15 How. 281) | 109 |
| v. Thomson (2 Wall. Jr. 209) | 109 |
| Magone v. Colorado Smelting etc. Co. (135 Fed. 846) | 1022, 1055 |
| Mahoney Min. Co. v. Bennett (4 Sawy. 289) | 1400 |
| Mahr v. Union Pac. R. Co. (140 Fed. 921) | 405, 406 |
| Maitland v. Gibson (79 Fed. 138) | 383, 385, 389 |
| Malcomson v. Wappoo Mills (85 Fed. 910) | 1504 |
| Mallory Mfg. Co. v. Fox (20 Fed. 409) | 1299 |
| Mallow v. Hinde (12 Wheat. 193) | 318, 319, 330 |
| Mamie, The (105 U. S. 773) | 214 |
| Manchester F. Assur. Co. v. Stockton etc. Works (38 Fed. 378) | 50, 1119 |
| Mandeville v. Riggs (2 Pet. 482) | 313, 315, 326, 332, 732 |
| Mangels v. Donau Brewing Co. (53 Fed. 518) | 319, 349, 1625 |
| Manhattan L. Ins. Co. v. Broughton (3 Sup. Ct. 90, 109 U. S. 121) | 221 |
| Manhattan Medicine Co. v. Wood (108 U. S. 218) | 26 |
| Manhattan B. Co. v. New York (18 Fed. 195) | 181 |
| Manhattan Trust Co. v. Sioux City etc. R. Co. (81 Fed. 50) | 1528 |
| Manning v. Jamesson (Fed. Cas. No. 9,045) | 797 |
| Mansfield etc. R. Co. v. Swan (111 U. S. 379, 4 Sup. Ct. 510) | 176, 177, 1205, 1206 |
| Manson v. Duncanson (166 U. S. 533) | 374 |
| Marchand v. Sobral (24 Fed. 316) | 72 |
| Marco v. Hicklin (6 C. C. A. 10, 56 Fed. 549) | 721 |
| Marden v. Campbell etc. Co. (25 C. C. A. 142, 79 Fed. 653) | 1173 |
| Marine etc. Min. etc. Co. v. Bradley (105 U. S. 175) | 200, 226, 1521 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|---------------------------|--|------------------------------|
| Marine Ins. Co. v. Hodgson (6 Cranch 206) | 660, 1099 | Massachusetts etc. Constr. Co. v. Cane Creek (15 Sup. Ct. 91, 155 U. S. 283) | 816 |
| Marion Phosphate Co. v. Cummer (9 C. C. A. 279, 60 Fed. 873) | 527 | v. Gill's Creek (48 Fed. 145) | 1223, 1224 |
| Markell v. Kasson (81 Fed. 104) | 811 | Massachusetts Mut. L. Ins. Co. v. Chicago etc. R. Co. (13 Fed. 857) | 411 |
| Markey v. Langley (92 U. S. 142) | 1655 | Massie v. Buck (62 C. C. A. 535, 128 Fed. 27) | 1396 |
| v. Mutual Ben. etc. Co. (Fed. Cas. No. 9,091) | 1118 | v. Graham (3 McLean 41, Fed. Cas. No. 9,263) | 1261, 1263, 1271, 1277, 1280 |
| Marks v. Fox (18 Fed. 713) | 902 | Matherson v. Howard (18 Wall. 99) | 304 |
| Marks Adjustable Folding Chair Co. v. Wilson (43 Fed. 302) | 1198 | Mathews Slate Co. v. Mathews (148 Fed. 490) | 18 |
| Marguer v. Frisbie (101 U. S. 473) | 25 | Matthews v. Lalance etc. Co. (2 Fed. 232) | 539, 544, 545 |
| Marshall v. Baltimore etc. R. Co. (16 How. 314) | 187, 196, 197 | v. Spangenberg (19 Fed. 823) | 1015 |
| v. Basin (Fed. Cas. No. 9,125) | 70 | Matter of, see names of parties. | |
| v. Beverley (5 Wheat. 313) | 308 | Mattingly v. Northwestern Virginia R. Co. (158 U. S. 53, 15 Sup. Ct. 725) | 176, 177, 1207 |
| v. Otto (59 Fed. 249) | 218, 554, 558, 1507, 1627 | Mattocks v. Baker (2 Fed. 455) | 225 |
| v. Turnbull (34 Fed. 827) | 115, 160 | Maxim Nordenfeldt etc. Co. v. Colts' Patent Firearms Mfg. Co. (103 Fed. 39) | 1024, 1033 |
| v. Vickburg (15 Wall. 146) | 571 | Maxwell v. Atchison etc. R. Co. (34 Fed. 286) | 209 |
| Marstin v. McRea (Hempst. 688, Fed. Cas. No. 9,141) | 1053 | v. Kennedy (8 How. 210) | 568 |
| Marthinson v. King (82 C. C. A. 360, 150 Fed. 48) | 52, 1205 | v. Wilmington etc. Co. (82 Fed. 214) | 1609 |
| Martin v. Kester (49 W. Va. 647) | 637 | Mayer v. Foulkrod (4 Wash. C. C. 349, Fed. Cas. No. 9,341) | 30, 37 |
| v. Palmer (72 Vt. 409) | 170 | Maynard v. Green (30 Fed. 643) | 709, 711 |
| v. Pond (80 Fed. 15) | 1625 | v. Tilden (28 Fed. 688) | 148, 667 |
| v. Snyder (148 U. S. 668, 13 Sup. Ct. 706) | 1206, 1207 | Mayo v. Carrington (19 Gratt. 116) | 982 |
| v. Taylor (Fed. Cas. No. 9,166) | 206 | Meade v. Beale (Taney 339) | 6, 23 |
| v. Wilson (155 Fed. 97) | 33 | Mears v. Lockhart (36 C. C. A. 239, 94 Fed. 274) | 998, 998 |
| Martindale v. Waas (11 Fed. 551) | 1244 | Mechanics Bank v. Lynn (1 Pet. 376) | 445 |
| Marvin v. Aultman (46 Fed. 338) | 133 | v. Seton (1 Pet. 299) | 308, 1008 |
| v. Ellis (9 Fed. 367) | 221, 330 | Meddaugh v. Wilson (151 U. S. 351, 14 Sup. Ct. 856) | 1216 |
| Marye v. Strouse (5 Fed. 494) | 778 | Medsker v. Bonebrake (108 U. S. 86) | 891, 909 |
| Maryland v. Baldwin (112 U. S. 490) | 834 | Mehlin v. Ice (56 Fed. 12, 5 C. C. A. 403) | 408 |
| Maryland Steel Co. v. Gettysburg El. Co. (99 Fed. 150) | 1585 | Meier v. Kansas Pac. R. Co. (5 Dill. 476, Fed. Cas. No. 9,395) | 1491, 1498, 1510, 1611 |
| Mason, <i>In re</i> (43 Fed. 515) | 1423 | Meissner v. Buek (28 Fed. 161) | 640, 646 |
| v. Crosby (Fed. Cas. No. 9,234) | 110 | Mellen v. Moline Iron Works (181 U. S. 352) | 895, 743, 825 |
| v. Crosby (3 Woodb. & M. 258, Fed. Cas. No. 9,236) | 891, 911, 912 | Mellor v. Smith (114 Fed. 116, 52 C. C. A. 64) | 661, 703, 706 |
| v. Eldred (6 Wall. 231) | 32 | Mellus v. Howard (2 Curt. C. C. 264, Fed. Cas. No. 9,408) | 1015, 1065 |
| v. Hartford etc. R. Co. (10 Fed. 334) | 470, 480, 540, 661, 737 | | |
| v. Jones (1 Hayw. & H. 328, Fed. Cas. No. 9,239) | 1417 | | |
| v. Jones (1 Hayw. & H. 329, Fed. Cas. No. 9,240) | 452 | | |
| v. New York Steam-Power Co. (87 Fed. 241) | 373, 390 | | |
| v. Northwestern Mut. L. Ins. Co. (106 U. S. 163, 1 Sup. Ct. 165) | 1653 | | |
| v. Pewabic Min. Co. (100 Fed. 340) | 847 | | |

TABLE OF CASES.

1871

[References are to pages.]

| | | | |
|--|---------------------------|--|--------------------------------------|
| Mellus v. Thompson (1 Cliff. 125).. | 283 | Merrill v. Monticello (66 Fed. 165).. | 568 |
| Memphis v. Brown (20 Wall. 289).. | 854 | Merrimac etc. Co. v. Schlesinger (124 Fed. 237) | 582 |
| v. Postal Tel. Cable Co. (76 C. C. A. 292, 145 Fed. 602).. | 568 | Merriman v. Chicago etc. R. Co. (12 C. C. A. 275, 29 U. S. App. 428, 64 Fed. 535) | 146, 150, 162, 258, 1162 |
| Memphis etc. R. Co. v. Alabama (107 U. S. 581)..... | 198 | Merritt v. American Steel-Barge Co. (24 C. C. A. 530, 79 Fed. 228).. | 16, 752, 1467 |
| Memphis Sav. Bank v. Houchens (52 C. C. A. 176, 115 Fed. 98) | 755 | Merritt etc. Co. v. Chubb (118 Fed. 173, 51 C. C. A. 119).... | 1198 |
| Menard v. Goggin (121 U. S. 253, 7 Sup. Ct. 873)..... | 191, 680 | v. Morris etc. Dredging Co. (127 Fed. 770) | 1198 |
| Mercantile Trust Co. v. Atlantic etc. R. Co. (70 Fed. 518)..... | 1688 | Merryfield v. Jones (2 Curt. 306)... | 1412 |
| v. Atlantic etc. R. Co. (80 Fed. 18) | 1574 | Merserole v. Union Paper Collar Co. (Fed. Cas. No. 9,488)..... | 188 |
| v. Chicago etc. R. Co. (61 Fed. 372) | 1630, 1685 | Metallic Extraction Co. v. Brown (110 Fed. 665, 49 C. C. A. 147) | 1197 |
| v. Chicago etc. R. Co. (60 C. C. A. 651, 123 Fed. 389).... | 855 | Metcalf v. American School etc. Co., (122 Fed. 115) | 533 |
| v. Farmers' Loan etc. Co. (26 C. C. A. 383, 81 Fed. 254).... | 1528, 1599 | v. Watertown (128 U. S. 586)... | 176, 180, 184 |
| v. Kanawha etc. R. Co. (39 Fed. 337) | 187, 1553, 1637 | Metcalfe v. Metcalfe (1 Atk. 63).... | 962 |
| v. Kanawha etc. R. Co. (50 Fed. 874) | 1596, 1601 | Methodist Churches v. Barker (18 N. Y. 463) | 1341 |
| v. Kanawha etc. R. Co. (58 Fed. 6, 7 C. C. A. 3, reversing 50 Fed. 874)..... | 1594, 1597, 1600, 1601 | Metropolis Bank v. Gutschlick (14 Pet. 19) | 1639 |
| v. Lamotte Valley R. Co. (16 Blatchf. 324, Fed. Cas. No. 9,482) | 1472 | Metropolitan Grain etc. Exch. v. Chi- cago Board of Trade (15 Fed. 847) | 1355 |
| v. Missouri etc. R. Co. (36 Fed. 221, 1 L.R.A. 397)..... | 1630 | Metropolitan Nat. Bank v. St. Louis Dispatch Co. (36 Fed. 722, <i>affirmed on ground of laches</i> 149 U. S. 436, 13 Sup. Ct. 944) | 1629 |
| v. Missouri etc. R. Co. (41 Fed. 8) | 795, 1486, 1522 | v. St. Louis Dispatch Co. (38 Fed. 57) | 656 |
| v. Missouri etc. R. Co. (84 Fed. 379) | 589, 605 | Metropolitan Trust Co. v. Columbus etc. R. Co. (93 Fed. 689)... | 114, 278 |
| v. Pittsburgh etc. R. Co. (29 Fed. 732) | 1487, 1488 | v. Columbus etc. R. Co. (95 Fed. 18) | 1530 |
| v. Pittsburgh etc. R. Co. (115 Fed. 475, 58 C. C. A. 207) | 839 | v. Lake Cities etc. Co. (100 Fed. 897) | 1472, 1594 |
| v. Texas etc. R. Co. (51 Fed. 529) | 221 | Mexican Cent. R. Co. v. Eckman (187 U. S. 429) | 351 |
| v. Rhode Island Hospital Trust Co. (86 Fed. 863)..... | 570 | v. Glover (46 C. C. A. 834, 107 Fed. 356) | 210 |
| Merchants etc. Bank v. Kent (43 Mich. 292, 5 N. W. 627)..... | 1474 | v. Pinkney (149 U. S. 194, 13 Sup. Ct. 859).... | 188, 193, 234, 235, 371, 402, 410 |
| Merchants' etc. Nat. Bank v. Masonic Hall (65 Ga. 608) | 668 | Mexican Ore Co. v. Mexican Guade- lupe Min. Co. (47 Fed. 351) | 1376, 1448 |
| Merchants' Bank v. Chrysler (14 C. C. A. 444, 67 Fed. 388) | 774, 775, 1608, 1609 | Mexico Southern Bank v. Reed (Fed. Cas. No. 9,514)..... | 196, 197 |
| Merchants' Ins. Co. In re (3 Biss. 165) | 1496 | Meyer v. Johnston (53 Ala. 237) .. | 1576, 1582, 1596, 1597 |
| Merchants' L. Assoc. v. Loakum (39 C. C. A. 56, 98 Fed. 251)..... | 1064 | v. Kuhn (13 C. C. A. 298, 65 Fed. 705) | 388, 396, 945 |
| Merriman v. Holloway Pub. Co. (48 Fed. 450) | 570 | Meyers v. Block (120 U. S. 206, 7 Sup. Ct. 525) | 1383, 1413 |
| Merrill v. Dawson (Hempst. 563, Fed. Cas. No. 9,469)..... | 1645, 1646 | v. Shields (61 Fed. 718) | 1852 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|---|---------------|---|---------------------|
| Miami Exporting Co. v. Gano (13 Ohio 269) | 1539 | Milnes v. Davison (3 Madd. 374).... | 1200 |
| Michaelson v. Denison (3 Day 294, Fed. Cas. No. 9,523)..... | 204 | Miltenberger v. Logansport etc. R. Co. (106 U. S. 286, 1 Sup. Ct. 140)... | |
| Michigan Cent. R. Co. <i>In re</i> (59 C. A. 643, 124 Fed. 727).... | 885, | 1577, 1584, 1587, 1597, 1655 | |
| 1161, 1162, 1223, 1806 | | Milwaukee etc. R. Co. v. Milwaukee etc. R. Co. (6 Wall. 742) .. | 648 |
| Michigan Pipe Co. v. Tremont etc. Co. (49 C. C. A. 324, 111 Fed. 284) | 26 | v. Soutter (2 Wall. 510) .. | 1462, |
| Michoud v. Girod (4 How. 503).... | 1161 | 1614, 1616 | |
| Middleton v. Bankers' etc. Tel. Co. (32 Fed. 524) | 885 | v. Soutter (154 U. S. 541).... | 1613 |
| Miles v. New South etc. Assoc. (95 Fed. 919) | 1499, 1500 | Miner v. Markham (28 Fed. 387) .. | 403 |
| v. Receivers (4 Hughes 172, Fed. Cas. No. 9,544) | 928 | Mineral Point R. Co. v. Keep (22 Ill. 9) | 378 |
| Miller v. Ahrens (150 Fed. 644) .. | 315, 580 | Minnesota v. Northern Securities Co. (184 U. S. 230) | 333 |
| v. Buchanan (5 Fed. 368) | 466 | Minnesota Co. v. St. Paul Co. (2 Wall. 609) .. | 382, 389, 744, 750 |
| v. Clark (47 Fed. 850, 49 Fed. 695) | 707, 1282 | v. St. Paul Co. (6 Wall. 742) .. | 711 |
| v. Consolidated Lake Superior Co. (110 Fed. 480) .. | 1358, 1366 | Minor v. Mechanics Bank (1 Pet. 46) .. | 80 |
| v. Highland Ditch Co. (87 Cal. 430, 25 Pac. 550) | 257 | Minot v. Mastin (95 Fed. 734, 37 C. A. 234) | 833, 835, 837, 1545 |
| v. M'Intyre (6 Pet. 61) .. | 480, | Mississippi v. Johnson (4 Wall. 475) .. | 24, 281 |
| 667, 668 | | Mississippi etc. R. Co. v. Ward (2 Black 485) | 828 |
| v. Morley etc. Co. (87 Fed. 621, 31 C. C. A. 148) | 1371 | Mississippi Mills v. Cohn (180 U. S. 202, 14 Sup. Ct. 75) .. | 13, 14, 24, 62 |
| v. Mutual etc. Assoc. (109 Fed. 278) | 1375 | Missouri etc. R. Co. v. Bradford (33 Fed. 701) | 1515 |
| v. New York (12 Wall. 159) .. | 1143 | v. Elliott (184 U. S. 530, 22 Sup. Ct. 446) | 1414 |
| v. Norfolk etc. R. Co. (47 Fed. 264) | 361 | v. Elliott (56 Fed. 772) | 31 |
| v. Pennsylvania R. Co. (91 Fed. 298) | 235 | Missouri etc. Trust Co. v. German Nat. Bank (77 Fed. 117, 28 C. C. A. 65) | 1488 |
| v. Rickey (146 Fed. 574) .. | 538, | Missouri Broom Mfg. Co. v. Guymon (53 C. A. 16, 115 Fed. 112) .. | 34 |
| 617, 621, 746 | | Missouri Pac. R. Co. v. Texas etc. R. Co. (31 Fed. 862) | 1512 |
| v. Rogers (29 Fed. 401) | 742 | v. Texas etc. R. Co. (33 Fed. 359) | 903 |
| v. Texas etc. R. Co. (132 U. S. 662, 10 Sup. Ct. 206) | 340 | v. Texas etc. R. Co. (33 Fed. 376) | 876 |
| v. Tobin (18 Fed. 609) | 1141 | v. Texas etc. R. Co. (33 Fed. 803) | 913 |
| v. U. S. (11 Wall. 299) | 176 | v. Texas etc. R. Co. (41 Fed. 319) | 1516 |
| v. Young (2 Cranch C. C. 53) .. | 1053 | v. Texas etc. R. Co. (50 Fed. 152) | 502, 533 |
| Miller-Magee Co. v. Carpenter (34 Fed. 433) | 234 | v. Texas Pac. R. Co. (41 Fed. 311) | 1548 |
| Milligan v. Milledge (3 Cranch 220) .. | 505, 507, 516 | Mitchell v. Colorado Fuel etc. Co. (117 Fed. 728) .. | 1359, 1371, 1372 |
| Millington v. Fox (3 Myl. & C. 352) .. | 1199 | v. Dowell (105 U. S. 430) | 817 |
| Mills v. Bank (11 Wheat. 431) | 71 | v. Moore (95 U. S. 578) | 141 |
| v. Dennis (3 Johns. Ch. (N. Y.) 367) | 947 | v. Overman (103 U. S. 62) | 1178 |
| v. Fletcher (100 Cal. 142, 34 Pac. 637) | 621 | Mittleburger v. Stanton (Fed. Cas. No. 9,676) | 1407 |
| v. Green (159 U. S. 651) .. | 1170, 1379 | Mix v. Beach (46 Ill. 314) | 701 |
| v. Hurd (82 Fed. 129) | 244 | Mobilia, The (147 Fed. 883) | 912 |
| v. Knapp (39 Fed. 592) | 288 | Moelle v. Sherwood (148 U. S. 21, 13 Sup. Ct. 428) | 1240, 1241 |
| v. Scott (43 Fed. 452) .. | 659, 671 | | |
| Milne v. Huber (3 McLean 212, Fed. Cas. No. 9,617) | 204 | | |

TABLE OF CASES.

1873

[References are to pages.]

| | | | |
|--|--------------|--|------------------|
| Moffat v. U. S. (112 U. S. 24)..... | 85 | Morgan v. Morgan (2 Wheat. 290) | |
| Moline Plow Co. v. Webb (141 U. S. 616, 12 Sup. Ct. 100)..... | 1633, 1689 | v. Potter (15 Sup. Ct. 590, 157 U. S. 195) | 317, 319 |
| Mollan v. Torrance (9 Wheat. 537) 179, 183, 200 | | Morgan's Louisiana Steamship Co. v. Texas Cent. R. Co. (137 U. S. 171, 11 Sup. Ct. 61) | 285 |
| Monmouth Invest. Co. v. Means (80 C. C. A. 527, 151 Fed. 159) | 28, 294, 348 | 626, 630, 642, 747, 1630 | |
| Monongahela Nat. Bank v. Jacobus (109 U. S. 275) | 1009 | Morrill v. American Reserve Co. (151 Fed. 305) | 1497, 1553 |
| Monroe Cattle Co. v. Becker (147 U. S. 47, 13 Sup. Ct. 217)..... | 99, 974 | Morris v. Bean (123 Fed. 618) | 1370 |
| Montalet v. Murray (4 Cranch 46) 200, 1205 | | v. Gilmer (129 U. S. 315) | 222, 224 |
| Montana Co. v. St. Louis Min. etc. Co. (152 U. S. 170)..... | 1342, 1383 | v. Graham (51 Fed. 53) | 403 |
| Montejo v. Owen (14 Blatchf. 824) | 8 | v. Harmer (7 Pet. 554) | 286 |
| Montgomery v. Attns. L. Ins. Co. (38 C. C. A. 553, 97 Fed. 918) | 1064 | v. Lindauer (4 C. C. A. 162, 54 Fed. 23) | 316, 1626 |
| v. McDermott (103 Fed. 801, 43 C. C. A. 348) | 757 | v. Morris (5 Mich. 171) | 474 |
| v. McDermott (99 Fed. 502) | 536, 756 | Morrison v. Buckner (Fed. Cas. No. 9,844) | 1626 |
| v. Petersburg Sav. etc. Co. (70 Fed. 746, 17 C. C. A. 360) | 1610 | v. Durr (122 U. S. 518, 7 Sup. Ct. 1215) | 974, 982 |
| Montgomery etc. Co. v. Chapman (128 Fed. 197) | 1359 | v. Marker (93 Fed. 692) | 39 |
| Montgomery Ward & Co. v. South Dakota etc. Assoc. (150 Fed. 413) | 1370 | Morse v. Montana Ore Purchasing Co. (105 Fed. 337) | 1424 |
| Montreal Bank v. Thayer (7 Fed. 622) | 1593, 1598 | v. Nicholson (55 N. J. Eq. 705, 38 Atl. 178) | 35 |
| Moody v. Flagg (125 Fed. 819) | 244 | v. South (80 Fed. 206) | 1155 |
| Moonan v. Delaware etc. R. Co. (68 Fed. 1) | 232 | Mores v. Domestic Sewing-Mach. Co. (38 Fed. 482) | 1452 |
| Moore v. British Columbia Bank (106 Fed. 574) | 1458, 1461 | Morton Trust Co. v. Keith (150 Fed. 606) | 814 |
| v. Green (76 C. C. A. 242, 145 Fed. 478) | 59 | v. New York etc. R. Co. (105 Fed. 539) | 228 |
| v. Greene (2 Curt. C. C. 202) | 111 | Mosgrove v. Kountze (14 Fed. 315) | 722 |
| v. Greene (19 How. 69) | 108, 109 | Mosher v. St. Louis etc. R. Co. (127 U. S. 395) | 561 |
| v. Huntington (17 Wall. 417) | 1164 | Moshier v. Knox College (32 Ill. 155) | 671 |
| v. Hylton (16 N. C. (1 Dev. Eq.) 439) | 487 | Mossman v. Higginson (4 Dall. 12) | 203 |
| v. New Orleans Waterworks Co. (114 Fed. 380) | 1579 | Mountain Copper Co. v. U. S. (73 C. A. 621, 142 Fed. 630) | 1419 |
| v. Nickey (66 C. C. A. 667, 133 Fed. 289) | 505 | Mountain View etc. Co. v. McFadden (180 U. S. 533) | 185 |
| v. Robbins (96 U. S. 530) | 14 | Mount Eden, The (87 Fed. 483) | 1192 |
| v. Southern States etc. Co. (83 Fed. 399) | 1505 | Mountford v. Raino (2 Keb. 499) | 963 |
| Mootry v. Grayson (104 Fed. 613, 44 C. C. A. 83) | 1231 | Movius v. Lee (30 Fed. 298) | 670 |
| Moran v. Dillingham (174 U. S. 153) | 1144 | Moxie Nerve Food Co. v. Modox Co. (152 Fed. 493) | 1208 |
| v. Hagerman (12 C. C. A. 239, 64 Fed. 499) | 622, 725 | v. Modox Co. (155 Fed. 304) | 1208 |
| More v. Steinbach (127 U. S. 70, 8 Sup. Ct. 1067) | 17, 18 | Muhlenberg County v. Citizens' Nat. Bank (65 Fed. 537) | 228, 389 |
| Morehead v. Striker (132 Fed. 943) | 1566 | Mulcahey v. Lake Erie etc. R. Co. (69 Fed. 172, reversed 79 Fed. 999, 24 C. C. A. 685) | 1055 |
| Morgan v. Callender (4 Cranch 370) 187, 188 | | Mullan v. U. S. (118 U. S. 271) | 85 |
| v. Gay (19 Wall. 81) | 200 | Mullee, <i>In re</i> (7 Blatchf. 23, Fed. Cns. No. 9,911) | 1425, 1450, 1452 |
| Eq. Prac. Vol. III.—118. | | Muller v. Dows (94 U. S. 444) | 196, 1627 |
| | | v. Henry (5 Sawy. 404, Fed. Cns. No. 9,916) | 1309, 1445 |
| | | Mulqueen v. Schlichter Jute etc. Co. (108 Fed. 931) | 8, 9 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|------------------|---|---------------|
| Mumford v. Mumford (1 Gall. 366)... | 282 | Nashville v. Cooper (6 Wall. 247)... | 1205 |
| Munday v. Vail (34 N. J. L. 418)... | 1163 | Nathan v. Craig (47 Fed. 522)..... | 115 |
| Mundy v. Louisville etc. R. Co. (67 Fed. 638, 14 C. C. A. 583)... | 1325 | National Bank v. Carpenter (101 U. S. 567)..... | 654 |
| Muns v. De Nemours (Fed. Cas. No. 9,931) | 206, 207 | National Cash Register Co. v. Leland (77 Fed. 242, 37 C. C. A. 372, 94 Fed. 502)..... | 1055 |
| Munson v. New York (11 Fed. 72)... | 1246 | v. Union Computing Mach. Co. (143 Fed. 342)..... | 568 |
| Murphy v. Lewis (Fed. Cas. No. 9-949a) | 207 | National Folding-Box etc. Co. v. Dayton Paper etc. Co. (91 Fed. 822)..... | 882, 883 |
| v. Southern R. Co. (99 Fed. 469) 912, 913 | | National Furnace Co. v. Moline etc. Works (18 Fed. 863)..... | 406 |
| v. Southern R. Co. (53 C. C. A. 477, 115 Fed. 257) | 917 | National Hay Brake Co. v. Harbert (2 W. N. C. 100, Fed. Cas. No. 10,044) | 170 |
| v. Stults (1 N. J. Eq. 560).... | 1146 | National Hollow Brake Co. v. Inter-changeable Brake Beam Co. (83 Fed. 26)..... | 476, 612 |
| Murray v. Chambers (151 Fed. 142) ... | 1202 | National Masonic etc. Assoc. v. Sparks (83 Fed. 225, 28 C. C. A. 399) | 224 |
| v. Hoboken Land etc. Co. (18 How. 283) | 281, 297 | National Nickel Co. v. Nevada Syndicate (112 Fed. 46, 50 C. C. A. 113) | 51 |
| v. Walter (Cr. & Ph. 114).... | 1183 | National Park Bank v. Halle (30 Ill. App. 17) | 161 |
| Muse v. Arlington (168 U. S. 436)... | 187 | National Plasterers Assoc. v. Smithies (1906) (A. C. 484)..... | 1129 |
| Mutter v. Chauvel (5 Russ. 42).... | 707 | National Steamship Co. v. Tugman (67 Fed. 16)..... | 1193 |
| Mutual Ben. etc. Co. v. Robison (22 L.R.A. 325, 7 C. C. A. 444, 58 Fed. 723) | 1008, 1048, 1051 | National Surety Co. v. State Bank (61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 598)..... | 30, 31, 1292 |
| Mutual Bldg. Fund Soc. etc. Bank v. Bossieux (1 Hughes 386, Fed. Cas. No. 9,977) | 78 | National Tube Works Co. v. Ballou (146 U. S. 517)..... | 43 |
| Mutual Ins. Co. v. Tweed (7 Wall. 44) | 18 | National Waterworks Co. v. Kansas City (65 Fed. 691)..... | 850 |
| v. Brune (96 U. S. 588).... | 1627 | Nations v. Johnson (24 How. 197) | 62 |
| Mutual L. Ins. Co. v. Chicago etc. R. Co. (13 Fed. 857, affirmed 109 U. S. 724)..... | 1617 | Naumburg v. Hyatt (24 Fed. 898) | 1458, 1496 |
| v. Hilmon (145 U. S. 285) | 795 | Neal v. Foster (34 Fed. 496) | |
| v. Pearson (114 Fed. 395) | 50 | 639, 641, 643, 644 | |
| Myers v. Dorr (13 Blatchf. 22, Fed. Cas. No. 9,988)..... | 546 | v. Foster (36 Fed. 29)..... | 221 |
| v. Fenn (5 Wall. 205).... | 339, 1155 | Neale v. Neale (9 Wall. 1)..... | 664, 678 |
| v. Hettinger (94 Fed. 370, 87 C. C. A. 369, affirming 81 Fed. 805) | 188 | Needham v. Washburn (4 Cir. 254, Fed. Cas. No. 10,082) | 660 |
| Myra Clark Whitney, <i>Esq.</i> p. (18 Pet. 404) | 65 | v. Wilson (47 Fed. 97) | 316 |
| N. | | | |
| Nalle v. Young (160 U. S. 624, 16 Sup. Ct. 420) | 1629 | Neel v. Pennsylvania Co. (157 U. S. 158) | 196 |
| Nantahala Marble etc. Co. v. Thomas (76 Fed. 59) | 1289 | Neely v. Newman (18 Sup. Ct. 944, 168 U. S. 708) | 505 |
| Napier v. Elam (6 Yerg. 114).... | 978 | Neff v. Pennoyer (3 Sawy. 835).... | 78 |
| v. Westerhoff (138 Fed. 420) | 1866 | Nellis v. Pennock Mfg. Co. (88 Fed. 379) | 670 |
| v. Westerhoff (153 Fed. 985) | 704, 705 | Nelson v. Eaton (18 C. C. A. 523, 66 Fed. 376) | 685, 945, 955 |
| Nash v. Ingalls (79 Fed. 510, 101 Fed. 645, 41 C. C. A. 545).... | 1548 | v. Hill (5 How. 132) | 277 |
| Nashua etc. Corp. v. Boston etc. Corp. (49 Fed. 774) | 861 | v. Hill (89 Fed. 477) | 1299 |
| v. Boston etc. Corp. (136 U. S. 356) | 223 | v. Lowndes County (35 C. C. A. 419, 93 Fed. 538) | 623 |
| Nashua Sav. Bank v. Burlington etc. Co. (89 Fed. 14) | 1635 | | |

[References are to pages.]

| | | | |
|---|--------------------------|--|------------------------------|
| Nelson v. Moon (3 McLean 319, Fed. Cas. No. 10,111)..... | 303 | New Orleans v. Fisher (91 Fed. 574, 34 C. C. A. 15, <i>affirmed</i> 180 U. S. 185) | 743, 744 |
| v. Robinson (Fed. Cas. No. 10,114) | 1402, 1406 | v. Houston (119 U. S. 265)..... | 184 |
| v. Robinson (Hempst. 464)..... | 1406 | v. New Orleans etc. Co. (142 U. S. 88) | 181 |
| v. U. S. (Pet. C. C. 235)..... | 1057, 1058 | v. New York Mail Steamship Co. (20 Wall. 387)..... | 1425 |
| v. Woodruff (1 Black 156)..... | 1054 | v. Warner (171 U. S. 686)..... | 182 |
| Neasmith v. Calvert (1 Woodb. & M. 37) | 502 | v. Warner (21 Sup. Ct. 353, 180 U. S. 199) | 860, 892 |
| Nevada Nickel Syndicate v. National Nickel Co. (86 Fed. 486)..... | 159, 165, 669, 703, 704, | v. Winter (1 Wheat. 81)..... | 187 |
| Neves v. Scott (13 How. 270)..... | 62 | New Orleans etc. R. Co. v. Mississippi (102 U. S. 135)..... | 184 |
| Nevitt, <i>In re</i> (54 C. C. A. 622, 117 Fed. 448)..... | 1423, 1425, 1430, 1452 | New Orleans Canal etc. Co. v. Stafford (12 How. 343)..... | 1639 |
| New Albany Waterworks v. Louisville Banking Co. (122 Fed. 776, 58 C. C. A. 576)..... | 353 | New Orleans Waterworks Co. v. New Orleans (164 U. S. 471)..... | 321 |
| Newby v. Oregon Cent. R. Co. (1 Sawy. 63, Fed. Cas. No. 10,145)..... | 515, 529, | New Providence Tp. v. Halsey (6 Sup. Ct. 764, 117 U. S. 336)..... | 221, 1199 |
| New Chester Water Co. v. Holly Mfg. Co. (53 Fed. 18, 3 C. C. A. 399)..... | 330 | Newton v. Eagle etc. Co. (76 Fed. 418) | 1579 |
| Newcomb v. Mutual L. Ins. Co. (Fed. Cas. No. 10,147)..... | 36 | v. Gage (155 Fed. 598)..... | 637, 638 |
| Newcombe v. Murray (77 Fed. 492)..... | 348 | v. Lewis (25 C. C. A. 161, 79 Fed. 715)..... | 1374, 1396 |
| New England etc. Co. v. Edison (110 Fed. 26) | 161 | New York v. Connecticut (4 Dall. 1)..... | 308, 1402 |
| v. Oakwood etc. Co. (71 Fed. 52) | 1872 | v. New Jersey Steamboat etc. Co. (24 Fed. 817)..... | 326 |
| New England Ins. Co. v. Detroit etc. Co. (Fed. Cas. No. 10,154)..... | 70 | v. Pine (185 U. S. 93, 22 Sup. Ct. 593) | 1419 |
| New England Mortg. Security Co. v. Tarver (60 Fed. 60, 9 C. C. A. 190) | 956, 1173 | New York etc. Co. v. Louisville etc. R. Co. (102 Fed. 382)..... | 1585 |
| New England Phonograph Co. v. National Phonograph Co. (148 Fed. 324, 325) | 1025 | New York etc. Coffee etc. Co. v. New York Coffee etc. Co. (9 Fed. 578)..... | 1073, 1075 |
| Newham v. Kenton (79 Mo. 382)..... | 138 | New York etc. R. Co. v. Hyde (56 Fed. 188, 5 C. C. A. 461)..... | 196, 198 |
| New Hampshire Sav. Bank v. Richey (58 C. C. A. 294, 121 Fed. 956)..... | 241, 269, | v. New York etc. R. Co. (58 Fed. 268) | 1495, 1517, 1527, 1553, 1555 |
| New Jersey v. New York (6 Pet. 328)..... | 401, | v. Shepard (5 McLean 455)..... | 187 |
| New Jersey Cent. R. Co. v. Mills (113 U. S. 249) | 181, | New York Constr. Co. v. Simon (53 Fed. 1) | 408 |
| Newland v. Rogers (3 Barb. Ch. 432)..... | 269 | New York Fourth Nat. Bank v. Carrollton R. Co. (11 Wall. 624)..... | 820 |
| Newman v. Moody (19 Fed. 858)..... | 577, 1154, 1240 | New York Grape Sugar Co. v. American Grape Sugar Co. (20 Blatchf. 386) | 1366 |
| v. Newton (14 Fed. 634)..... | 1232 | New York Guaranty etc. Co. v. Tacoma R. etc. Co. (83 Fed. 365, 27 C. C. A. 550) | 1150 |
| v. Schwerlin (61 Fed. 865, 10 C. A. 129) | 814 | New York Guaranty Co. v. Memphis Water Co. (107 U. S. 205)..... | 11 |
| v. Wallis (2 Bro. Ch. 143)..... | 507 | New York L. Ins. Co. v. Bangs (108 U. S. 485) | 374 |
| New Memphis Gas etc. Co. v. Memphis (72 Fed. 952)..... | 1368, 1372, 1373, 1375 | New York Security etc. Co. v. Lincoln St. R. Co. (74 Fed. 67, 77 Fed. 527) | 709, 1826, 1830, 1831 |
| New Orleans v. Benjamin (153 U. S. 411, 169 U. S. 161, 71 Fed. 758, 75 Fed. 417, 20 C. C. A. 591) | 48 | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|---|------------------|---|--------------------|
| New York Ventilator Co. v. American Institute (24 Fed. 561)..... | 1370 | Northern Indiana R. Co. v. Michigan Cent. R. Co. (Fed. Cas. No. 10,321)..... | 308 |
| New York Wire R. Co. v. Cake (Fed. Cas. No. 10,217)..... | 696 | Northern Pac. R. Co. v. Amacker (1 C. C. A. 345, 49 Fed. 529, affirming 46 Fed. 233)..... | 28 |
| Nicholas v. Murray (Fed. Cas. No. 10,223)..... | 559, 568 | v. American Trading Co. (195 U. S. 461)..... | 1518 |
| Nicholls v. Johns (2 Cranch C. C. 66)..... | 361 | v. Barnesville etc. Co. (4 Fed. 298)..... | 1406 |
| Nichols v. Brunswick (3 Cliff. 88)..... | 1190 | v. Burlington etc. R. Co. (2 McCrary 203)..... | 1406 |
| v. U. S. (7 Wall. 126)..... | 298 | v. Heflin (83 Fed. 93, 27 C. C. A. 460)..... | 1495, 1576 |
| Nickerson v. Atchison etc. R. Co. (30 Fed. 85)..... | 67 | v. Kindred (14 Fed. 77)..... | 253 |
| Nickle v. Stewart (111 U. S. 776, 4 Sup. Ct. 700)..... | 1256, 1261, 1276 | v. Kurtzman (82 Fed. 241)..... | 1289 |
| N. K. Fairbank Co. v. Windsor (61 C. C. A. 233, 124 Fed. 200)..... | 1149 | v. Paine (119 U. S. 562)..... | 8 |
| Noble v. Union River Logging R. Co. (147 U. S. 165)..... | 26 | v. Roberts (42 Fed. 734 affirmed 158 U. S. 1, 15 Sup. Ct. 756)..... | 570 |
| Noel v. Ward (1 Madd. 322)..... | 116 | v. St. Paul etc. R. Co. (47 Fed. 536)..... | 1366 |
| Nolen v. Woods (12 Lea 615)..... | 1658 | v. Sanders (47 Fed. 604)..... | 1149 |
| Non-Magnetic Watch Co. v. Association Horlogere Suisse (45 Fed. 210)..... | 945, 955 | v. Spokane (52 Fed. 428)..... | 1387 |
| Noonan v. Bradley (9 Wall. 394, 12 Wall. 121)..... | 283 | v. Urbin (15 Sup. Ct. 840, 158 U. S. 271)..... | 1091 |
| v. Braley (2 Black 499)..... | 62, 1632, 1658 | v. Walker (148 U. S. 391)..... | 215 |
| v. Delaware etc. R. Co. (68 Fed. 1)..... | 232, 400 | v. Walker (47 Fed. 681)..... | 251 |
| v. Lee (2 Black 499)..... | 33, 67, 108, 140 | Northern R. Co. v. Ogdensburg etc. R. Co. (18 Fed. 815)..... | 622 |
| Normandie, The (40 Fed. 590)..... | 1062 | v. Ogdensburg etc. R. Co. (20 Fed. 347)..... | 622 |
| Norris v. Atlas Steamship Co. (37 Fed. 279)..... | 409 | Northern Securities Co. v. U. S. (191 U. S. 555)..... | 1145 |
| v. Hassler (22 Fed. 401)..... | 240 | Northern Trust Co. v. Snyder (77 Fed. 818, 23 C. C. A. 480)..... | 1194 |
| Norris Safe etc. Co. v. Manganese Steel Safe Co. (150 Fed. 577)..... | 855 | North Muskegon v. Clark (10 C. C. A. 591, 62 Fed. 694)..... | 1627 |
| North American Land etc. Co. v. Watkins (48 C. C. A. 254, 109 Fed. 101)..... | 1353, 1479 | Northwestern Fuel Co. v. Brock (139 U. S. 216)..... | 1206 |
| North American Transp. etc. Co. v. Morrison (178 U. S. 262, 20 Sup. Ct. 809)..... | 200, 209 | Northwestern Mut. L. Ins. Co. v. Keith (23 C. C. A. 196, 77 Fed. 374)..... | 77, 1659 |
| North Bloomfield etc. Co. In re (27 Fed. 795)..... | 1426, 1450 | v. Nelson (103 U. S. 544)..... | 1641 |
| North British etc. Ins. Co. v. Lathrop (17 C. C. A. 175, 70 Fed. 429)..... | 625 | Norton v. Brewster (23 Fed. 840)..... | 176 |
| North Carolina R. Co. v. Drew (3 Woods 692)..... | 998, 1021, 1088 | v. Eagle Automatic Can Co. (61 Fed. 293)..... | 1409 |
| v. Swasey (28 Wall. 405)..... | 911, 1233 | v. Hood (12 Fed. 763)..... | 1366, 1402 |
| North Chicago St. R. Co. v. Chicago Union Traction Co. (150 Fed. 612)..... | 658, 684, 1540 | v. Walsh (49 Fed. 769)..... | 1248 |
| Northern Alabama R. Co. v. Hopkins (87 Fed. 505, 31 C. C. A. 94)..... | 1565, 1566, 1605 | Norway v. Rowe (19 Ves. Jr. 150)..... | 1362 |
| Northern Illinois Coal etc. Co. v. Young (12 Fed. 809)..... | 1288 | Norwood v. Sutton (Fed. Cas. No. 10,365)..... | 797 |
| Northern Indiana R. Co. v. Michigan Cent. R. Co. (15 How. 238)..... | 334, 1343 | Nourse v. Allen (Fed. Cas. No. 10,367, 4 Blatchf. 376)..... | 115 |
| | | Novelty Tufting Mach. Co. v. Buser (158 Fed. 83)..... | 1278 |
| | | Noyes v. Willard (Fed. Cas. No. 10,374, 1 Woods 187)..... | 501, 514, 515, 567 |
| | | Nurse v. Bunn (5 Sim. 225)..... | 968 |
| | | Nusbaum v. Emery (5 Biass. 393, Fed. Cas. No. 10,381)..... | 799 |

TABLE OF CASES.

1877

[References are to pages.]

| O. | | | |
|---|----------------|--|-------------------------|
| Oakes v. Myers (68 Fed. 807)..... | 1504 | Olyphant v. St. Louis etc. Co. (28 Fed. 729) | 1526 |
| Oaksmit v. Johnston (92 U. S. 343) | 8 | Omaha v. Redick (27 U. S. App. 204, 11 C. C. A. 1, 63 Fed. 1)..... | 1164, 1277 |
| Ober v. Gallagher (93 U. S. 199)..... | 11, 1627 | Omaha Horse R. Co. v. Cable Tramway Co. (32 Fed. 727)..... | 1165 |
| Oberlin College v. Blair (70 Fed. 414) | 349 | v. Cable Tramway Co. (38 Fed. 689) | 757 |
| O'Brien v. Champlain etc. Co. (107 Fed. 328) | 248 | Omaha Hotel Co. v. Wade (97 U. S. 13) | 327 |
| O'Brien County v. Brown (1 Dill. 588, Fed. Cas. No. 10,399)..... | 740 | Omai v. Swan (3 Mason 474, Fed. Cas. No. 10,508) | 1657 |
| O'Callaghan v. O'Brien (116 Fed. 984, reversed 60 C. C. A. 347, 125 Fed. 657) | 1044 | Onge v. Truelock (2 Molloy 31).... | 728 |
| O'Connell v. Pennsylvania R. Co. (55 C. C. A. 483, 118 Fed. 989)..... | 1064 | Onslow County v. Tolman (76 C. C. A. 317, 145 Fed. 753)..... | 1443 |
| O'Connor v. O'Connor (146 Fed. 984)..... | 742 | Opie v. Castleman (32 Fed. 511) | 1640 |
| Odom v. Owen (2 Baxt. 446)..... | 638 | Orange Nat. Bank v. Traver (7 Sawy. 210) | 503 |
| Oelrichs v. Spain (15 Wall. 211)..... | 1414, 1416 | Orchard v. Hughes (1 Wall. 73).... | 67, 140, 1639, 1658 |
| Ogburn v. Dunlap (9 Lea 185)..... | 792 | Ord v. Huddleston (Dick. 510).... | 541 |
| Ogden City v. Armstrong (168 U. S. 224) | 44, 215, | Oregon etc. Co. v. Northern Pac. R. Co. (32 Fed. 428) | 721 |
| v. Weaver (108 Fed. 564, 47 C. A. 485)..... | 18 | v. Shell (143 Fed. 1006, 125 Fed. 979) | 178 |
| Ogilvie v. Knox Ins. Co. (22 How. 380) | 327 | Oregonian R. Co. v. Oregon etc. Co. (22 Fed. 245, 28 Fed. 232) | 502 |
| Ogle v. Brandling (2 Russ. & M. 688, 1 Barb. Ch. Pr. 319)..... | 1145 | Oregon Short Line etc. R. Co. v. Skottowe (162 U. S. 490) | 180, 182, 185 |
| Ogle, <i>In re</i> (93 Fed. 432)..... | 1356 | O'Reilly v. Morse (15 How. 120).... | 1197 |
| Oglesby v. Attrill (12 Fed. 227) | 749 | Orendorf v. Budlong (12 Fed. 24) | 583, 1154 |
| v. Attrill (14 Fed. 214) | 674 | Ormond v. Hutchinson (18 Ves. Jr. 47, 16 Ves. Jr. 94) | 967, 968 |
| O'Hara, Matter of (8 Am. L. Reg. N. S. 113)..... | 1218 | Ormsby v. Ottman (85 Fed. 492, 29 C. C. A. 295) | 786 |
| v. MacConnell (93 U. S. 150) | 800, 305, 316, | Orr v. Diaper (4 Ch. D. 92) | 1121 |
| 948 | 948 | v. Littlefield (1 Woodb. & M. 13) | 1366, 1402 |
| Ohio Cent. R. Co. v. Central Trust Co. (10 Sup. Ct. 235, 133 U. S. 83) | 950, 1662 | Orvis v. Powell (98 U. S. 176).... | 1652, 1653 |
| Ohio Coal Co. v. Whitcomb (59 C. C. A. 487, 123 Fed. 359) | 1017 | Osborn v. Michigan Air-Line R. Co. (Fed. Cas. No. 10,549) | 743 |
| Olcott v. Bynum (17 Wall. 44)..... | 1656 | Osborn v. Osborn (5 Fed. 389) | 934 |
| Old Colony Trust Co. v. Atlanta R. Co. (100 Fed. 798)..... | 349 | v. U. S. Bank (9 Wheat. 738) | 298, 398, 399, 971 |
| Olds Wagon Works v. Benedict (67 Fed. 5, 14 C. C. A. 285) | 177 | Osborne v. Barge (30 Fed. 805) | 751, 828 |
| Oliver v. Clarke (106 Fed. 402, 45 C. A. 360) | 1544 | v. Wisconsin Cent. R. Co. (43 Fed. 824) | 262, 347 |
| v. Haywood (1 Anstr. 82) | 1129 | Osgood v. A. S. Aloe Instrument Co. (69 Fed. 291) | 428, 432, 434, 462, 465 |
| v. Platt (3 How. 338) | 250, | O'Shaugnessy v. Humes (129 Fed. 958) | 829, 559 |
| 276, 277, | 901 | Oswald v. Givens (Rich. Eq. Cas. 326) | 637 |
| Olmstead v. Distilling etc. Co. (67 Fed. 24) | 1492 | Otaheite Gold etc. Co. v. Dean (102 Fed. 929) | 1370 |
| v. Distilling etc. Co. (78 Fed. 44) | 1464, 1488 | Oteri v. Sealso (145 U. S. 578) | 918 |
| Olmsted v. Superior (155 Fed. 173) | 247 | | |
| Olney v. Tanner (10 Fed. 101) | 1542 | | |
| Olyphant v. St. Louis etc. Co. (28 Fed. 465) | 1636 | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|------------------------|---|---------------|
| Otto v. Regina Music-Box Co. (87 Fed. 510)..... | 117 | Pardee v. Aldridge (189 U. S. 483)..... | 1625 |
| Outhwhite v. Porter (13 Mich. 583)..... | 945 | Paris, Es p. (3 Woodb. & M. 227)..... | 1189 |
| Overman Wheel Co. v. Elliott (Hickory Cycle Co. (49 Fed. 859)..... | 114 | Parisian Comb Co. v. Eschwege (92 Fed. 721)..... | 1027 |
| Overton v. Memphis etc. R. Co. (10 Fed. 866, 3 McCrary 436)..... | 1459, 1460, 1462, 1463 | Park v. New York etc. R. Co. (57 Fed. 799)..... | 1528, 1529 |
| Owens v. Ohio Cent. R. Co. (20 Fed. 10) | 1467, 1469 | v. New York etc. R. Co. (70 Fed. 641) | 743, 752 |
| Oxley Stave Co. v. Butler County (166 U. S. 655)..... | 191 | Parker v. Concord (39 Fed. 718)..... | 961 |
| Ozark Land Co. v. Leonard (24 Fed. 660) | 458, 956, 1238 | v. Dacres (130 U. S. 43)..... | 1652 |
| P. | | | |
| Pacific etc. R. Co. v. Missouri Pac. R. Co. (4 Sup. Ct. 583, 111 U. S. 505)..... | 559, 744 | v. Judges of Circuit Court (12 Wheat. 561) | 1347, 1410 |
| Pacific Express Co. v. Selbert (142 U. S. 339)..... | 44 | v. Overman (18 How. 137)..... | 191 |
| Pacific Live-Stock Co. v. Hanley (98 Fed. 327) | 257, 570 | v. Phetteplace (1 Wall. 684)..... | 974 |
| Pacific Mut. L. Ins. Co. v. Tompkins (41 C. C. A. 488, 101 Fed. 539) | 283, 285, 659 | v. Phetteplace (Fed. Cas. No. 10,746) | 974, 984 |
| Pacific Northwest etc. Co. v. Allen (109 Fed. 515, 48 C. C. A. 521) | 1459, 1484 | v. Winnipiseogee Lake Cotton etc. Co. (2 Black 552) | 1371, 1405 |
| Pacific Postal Tel. Cable Co. v. Irvine (49 Fed. 113) | 197 | Parkersburg First Nat. Bank v. Prager (84 C. C. A. 51, 91 Fed. 689) | 1207 |
| Pacific R. Co. v. Atlantic etc. R. Co. (20 Fed. 277) | 247 | Parkhurst v. Kinsman (2 Blatchf. 72, Fed. Cas. No. 10,758) | 704, 721 |
| v. Ketchum (101 U. S. 289) | 349, 351 | v. Kinsman (2 Blatchf. 76, Fed. Cas. No. 10,759) | 1438, 1440 |
| v. Missouri Pac. R. Co. (95 U. S. 1) | 1455 | v. Kinsman (Fed. Cas. No. 10,760) | 1388, 1480 |
| v. Missouri Pac. R. Co. (1 McCrary 647) | 372, 385, 411 | Parkinson v. Wentworth (11 Mass. 26) | 282 |
| Pacific R. Commission, <i>In re</i> (82 Fed. 241) | 1059 | Parks v. Booth (102 U. S. 96) | 904 |
| Pacific R. Removal Cases (115 U. S. 1) | 184 | Parks County v. Decatur (70 C. C. A. 674, 138 Fed. 550) | 1207 |
| Pacific Whaling Co. v. U. S. (187 U. S. 452) | 297 | Parley's Park etc. Co. v. Kerr (130 U. S. 256) | 65 |
| Page v. Chillicothe (6 Fed. 599) | 231, 409 | Parrott v. Alabama Gold L. Ins. Co. (5 Fed. 391) | 403 |
| v. Holmes Burglar-Alarm Tel. Co. (2 Fed. 330) | 1247, 1249 | Parsons v. Charter Oak L. Ins. Co. (31 Fed. 305) | 1544 |
| v. Holmes Burglar Alarm Tel. Co. (18 Blatchf. 118) | 1246 | v. Cumming (1 Woods 461, Fed. Cas. No. 10,775) | 443 |
| Paine v. U. S. Playing-Card Co. (90 Fed. 543) | 1871 | v. Denis (7 Fed. 317) | 9 |
| Pakradooni v. Story Cotton Co. (151 Fed. 607) | 1501 | v. Lyman (4 Blatchf. 432, Fed. Cas. No. 10,779) | 847 |
| Palace-Car Co. v. Washburn (66 Fed. 790) | 742 | v. Marye (23 Fed. 121) | 1341 |
| Palmer v. McCormick (28 Fed. 541) | 1650 | Partee v. Thomas (11 Fed. 769) | 160, 558, 651 |
| Palmer v. Scriven (21 Fed. 854) | 1547 | Paschal, <i>In re</i> (10 Wall. 483) | 1212, 1298 |
| Paper Bag Cases (105 U. S. 766) | 1222 | Patapisco Ins. Co. v. Southgate (5 Pet. 604) | 1078 |
| | | Paterson Second Nat. Bank v. New York Silk Mfg. Co. (11 Fed. 532) | 1486, 1487 |
| | | Paton v. Majors (46 Fed. 210) | 1119, 1125 |
| | | Patrick v. Isenhart (20 Fed. 839) | 140, 826 |
| | | Patriotic Bank v. Washington Bank (Fed. Cas. No. 10,806, 5 Cranch C. 602) | 470 |
| | | Patterson v. Ball (1 Cranch C. C. 571) | 1208 |

TABLE OF CASES.

1879

[References are to pages.]

| | | |
|--|--|--------------------|
| Patterson v. Bowie (1 Cranch C. C. 425, Fed. Cas. No. 10,825) 1829 | Pennsylvania v. Quicksilver Min. Co. (10 Wall. 553) | 198 |
| v. Gaines (6 How. 584)....475, 925 | v. Wheeling etc. Bridge Co. (13 How. 518).....13, 57, 1871 | |
| v. McLaughlin (1 Cranch C. C. 352, Fed. Cas. No. 10,828) 1827, 1829, 1836 | v. Wheeling etc. Bridge Co. (18 How. 421) | 1446 |
| v. Slaughter (Ambl. 292).....690 | Pennsylvania Co. v. Bay (188 Fed. 203) | 210, 463, 468 |
| Patton v. Glatz (56 Fed. 367).....50 | v. Bay (150 Fed. 770).....263 | |
| v. Taylor (7 How. 182).....33 | v. Bender (148 U. S. 258).....191 | |
| Paul Steam System Co. v. Paul (129 Fed. 757) | v. Cole (182 Fed. 668) | 977 |
| Pawtucket Sav. Inst. v. Bowen (7 Biss. 358, Fed. Cas. No. 10,882)....1861 | v. Jacksonville etc. R. Co. (13 C. C. A. 550, 66 Fed. 421). 1222 | |
| Payne v. Hook (7 Wall. 425)....14, 62, 248, 1164 | v. Jacksonville etc. R. Co. (93 Fed. 60, 35 C. C. A. 202).. 1604 | |
| v. Kansas etc. R. Co. (46 Fed. 546) | v. Philadelphia etc. R. Co. (69 Fed. 482).....1631, 1632 | |
| Pearce v. Grove (3 Atk. 522).....697 | Pennsylvania Globe Gaslight Co. v. Globe Gas Light Co. (121 Fed. 1015) | 803, 805, 812, 818 |
| v. Mewlyn (3 Madd. 186).....1198 | Pennsylvania Ins. Co. v. Jacksonville etc. R. Co. (66 Fed. 421, 18 C. C. A. 550) | 1574, 1605 |
| v. Rice (142 U. S. 28, 12 Sup. Ct. 130) | Pennsylvania R. Co. v. Allegheny Valley R. Co. (48 Fed. 189).....1647 | |
| Peck, <i>In re</i> (8 Blatchf. 118, Fed. Cas. No. 10,885)....1108, 1107, 1110 | Penny v. Martin (4 Johns. Ch. 566) | 32 |
| Peck v. Ayers etc. Tie Co. (116 Fed. 273, 58 C. C. A. 551)....11, 16, 30, 41, 1164 | Pentlarge, <i>In re</i> (Fed. Cas. No. 10-962) | 1265 |
| v. Elliott (38 L.R.A. 616, 79 Fed. 10, 24 C. C. A. 425)....743, 751 | Pentlarge v. Kirby (20 Fed. 898)....1206 | |
| v. Jenness (7 How. 612) | v. Pentlarge (22 Fed. 412)....463, 538, 550 | |
| Peeler v. Lathrop (1 C. C. A. 93, 48 Fed. 780).....209, 974, 982 | People's Bank v. Calhoun (102 U. S. 256) | 1545 |
| Peirce v. West (3 Wash. C. C. 354, Fed. Cas. No. 10,910).....672 | People's Nat. Bank v. Marye (107 Fed. 570, 191 U. S. 272).....262 | |
| Pelham v. Edelmeyer (15 Fed. 262)....104, 569 | People's Sav. Inst. v. Miles (76 Fed. 252, 22 C. C. A. 152)....832, 834, 836 | |
| Pellett v. Great Northern R. Co. (105 Fed. 194).....1207 | Peoria etc. R. Co. v. Pixley (15 Ill. App. 283) | 560 |
| Pember v. Mathers (1 Bro. Ch. 52).....931 | Peper v. Fordyce (119 U. S. 469, 7 Sup. Ct. 287).....316, 1207 | |
| Pendery v. Carleton (87 Fed. 41, 30 C. C. A. 510).....665 | Pepper v. Addicks (158 Fed. 388)....851 | |
| Pendleton v. Evans (4 Wash. C. C. 336, 391, Fed. Cas. Nos. 10,920, 10,921)....948 | v. Rogers (187 Fed. 178).....1112 | |
| v. Russell (144 U. S. 640, 12 Sup. Ct. 743).....1487, 1488 | Perego v. Bonesteele (5 Biss. 69, Fed. Cas. No. 10,976).....1503 | |
| Peninsular Iron Co. v. Stone (121 U. S. 631) | v. Dodge (163 U. S. 164).....55 | |
| Penn r. Butler (Fed. Cas. No. 10,981, Wall. C. C. 4).....471, 481 | Pere Marquette R. Co. v. Bradford, (149 Fed. 492).....260, 1407, 1409 | |
| Pennell v. Meyer (2 Moody & R. 98)....968, 967 | Perez v. Fernandez (202 U. S. 80)....176 | |
| Pennington v. Smith (78 Fed. 399, 24 C. C. A. 145, reversing 75 Fed. 157) | Perin v. Megibben (58 Fed. 86, 3 C. C. A. 443) | 849 |
| Penn Mut. L. Ins. Co. v. Austin (168 U. S. 695).....179 | Perkins, <i>In re</i> (100 Fed. 950)....1423, 1441 | |
| v. Union Trust Co. (88 Fed. 891) | Perkins v. Fourniquet (14 How. 331) 1297 | |
| Pennock v. Coe (23 How. 117)....1620 | v. Hendryx (31 Fed. 522, 23 Fed. 418).....493, 684, 685, 1125 | |
| Pennoyer v. Neff (95 U. S. 714)....371 | v. Hendryx (149 Fed. 526)....314, 494, 1147, 1292 | |
| | Perry v. Corning (Fed. Cas. No. 11-004, 7 Blatchf. 195).....115 | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|---|------------------|--|------------|
| Perry v. Godbe (82 Fed. 141) | 835, | Philadelphia etc. R. Co. v. Quigley (21 How. 202) | 197 |
| | 1155, 1488, 1489 | | |
| v. Littlefield (Fed. Cas. No. 11,- 008) | 570 | Philadelphia Third Nat. Bank v. National Bank (86 Fed. 852, 30 C. C. A. 436) | 917 |
| v. Parker (1 Woodb. & M. 280) | 1344 | Philippi v. Philippi (115 U. S. 151) | 115 |
| v. Rubber Tire Wheel Co. (138 Fed. 836) | 1033 | Phillips v. Detroit (3 Filipp. 92, Fed. Cas. No. 11,101) | 1391 |
| v. Tacoma Mill Co. (152 Fed. 115, 81 C. C. A. 333) | 1651 | v. Mariner (Fed. Cas. No. 11,- 105) | 1280 |
| Person v. Fidelity etc. Co. (84 Fed. 759) | 409 | Phinizy v. Augusta etc. R. Co. (56 Fed. 273) | 1494, 1611 |
| v. Standard etc. Co. (92 Fed. 1022, 35 C. C. A. 679) | 409 | Philips v. Sedgwick (95 U. S. 3) | 1163 |
| Persons v. Beling (116 Fed. 877) | 1096 | Phoenix Ins. Co. v. Wulf (1 Fed. 775) | 372, 376 |
| Peters v. Bowman (98 U. S. 56) | 272, 828 | Phoenix Mut. L. Ins. Co. v. Bailey (13 Wall. 616) | 28, 50 |
| v. Prevost (1 Paine 64, Fed. Cas. No. 11,032) | 1039, 1043 | Phosphate Co. v. Brown (20 C. C. A. 428, 74 Fed. 328, 42 U. S. App. 57) | 685 |
| v. Tonapah Min. Co. (120 Fed. 587) | 443, 469 | Piatt v. Oliver (Fed. Cas. No. 11,114) | 554 |
| Petersburg Sav. etc. Co. v. Della-torre (70 Fed. 648, 17 C. C. A. 310) | 1283, 1574, 1607 | v. Oliver (8 McLean 27, Fed. Cas. No. 11,118) | 346 |
| Peterson v. Morris (98 Fed. 48) | 402, 405 | v. Vattier (9 Pet. 405) | 480 |
| Petri v. Commercial Bank (142 U. S. 644) | 196 | Pickham v. Wheeler-Bliss Mfg. Co. (77 Fed. 668, 23 C. C. A. 391) | 208 |
| Pettibone v. Derringer (4 Wash. C. C. 215) | 1053 | v. Wheeler-Bliss Mfg. Co. (168 U. S. 708, 18 Sup. Ct. 945) | 208 |
| v. U. S. (148 U. S. 197) | 1424 | Picquet v. Swan (5 Mason 35, Fed. Cas. No. 11,134) | 372 |
| Pettit v. Hope (2 Fed. 823) | 582 | v. Swan (5 Mason 561) | 791 |
| Peugh v. Davis (113 U. S. 542, 5 Sup. Ct. 662) | 1200 | Pictet Artificial Ice Co. v. New York Ice Mach. Co. (12 Fed. 816) | 812 |
| Pewabic Min. Co. v. Mason (145 U. S. 349, 12 Sup. Ct. 887) | 1531 | Pierce v. Feagans (89 Fed. 587) | 554 |
| Peyton v. Veitch (2 Cranch C. C. 123) | 1053 | v. Union Pac. R. Co. (47 Fed. 709) | 133 |
| Pfanschmidt v. Kelly Mercantile Co. (32 Fed. 667) | 1246 | v. West (Pet. C. C. 851, Fed. Cas. No. 10,909) | 495 |
| Phelps v. Elliott (26 Fed. 881) | 553, 658 | Pierpont v. Fowle (Fed. Cas. No. 11,- 152) | 817 |
| v. Elliott (29 Fed. 53, appeal dismissed 140 U. S. 694, 11 Sup. Ct. 1026) | 326 | v. Gregory (94 Fed. 373, 36 C. C. A. 299) | 404 |
| v. Elliott (30 Fed. 396) | 577 | Pikes Peak Power Co. v. Colorado Springs (44 C. C. A. 888, 105 Fed. 1) | 26 |
| v. Elliott (31 Fed. 461) | 104 | Pine Lake Iron Co. v. La Fayette Car Works (53 Fed. 858) | 1487 |
| v. Loyhed (1 Dill. 512, Fed. Cas. No. 11,077) | 1659, 1662 | Pine v. New York (103 Fed. 337) | 210 |
| v. McDonald (99 U. S. 304) | 297 | Pioneer Gold Min. Co. v. Baker (20 Fed. 4) | 315 |
| v. Oaks (117 U. S. 236, 6 Sup. Ct. 714) | 794 | Piper v. Brown (Fed. Cas. No. 11,- 181) | 872 |
| Phenix Ins. Co. v. Schultz (80 Fed. 337, 25 C. C. A. 453, 77 Fed. 875) | 470, 1535, 1537 | Piquet v. Swan (5 Mason 561) | 815 |
| v. Wilcox etc. Guano Co. (65 Fed. 724, 18 C. C. A. 88) | 8 | Piquignot v. Pennsylvania R. Co. (16 How. 104) | 187 |
| Phettiplace v. Sayles (4 Mason 312, Fed. Cas. No. 11,083) | 1067 | Pitman, Matter of (1 Curt. C. C. 186, Fed. Cas. No. 11,184) | 1441 |
| Philadelphia etc. Iron Co. v. Daube (71 Fed. 583) | 1541 | | |

[References are to pages.]

| | | | |
|---|--|---|----------------|
| Pittsburgh etc. R. Co. v. Baltimore | | Pope Mfg. Co. v. Owsley (27 Fed. 100) | 1122 |
| etc. Co. (10 C. C. A. 20. 61 | | Pope Motor Car Co. v. Keegan (150 Fed. 148) | 1886 |
| Fed. 705, reversing 55 Fed. | | Porter v. Sabin (149 U. S. 478, 18 Sup. Ct. 1011) | 1545 |
| 701) 312, 350 | | Porterfield, <i>In re</i> (138 Fed. 192) | 3 |
| v. Board of Public Works (172 U. S. 32) | 44 | Portsmouth, <i>In re</i> (G. Coop. 106) | 1145 |
| v. Keokuk etc. Co. (107 Fed. 781, 46 C. C. A. 639, re-hearing denied 109 Fed. 279, 48 C. C. A. 362) | 1284, 1291 | Post v. Beacon etc. Co. (32 C. C. A. 151, 89 Fed. 1) | 568 |
| v. Ramsey (22 Wall. 326) | 185 | v. Buckley (119 Fed. 249) | 314 |
| Pittsburgh Reduction Co. v. Cowles Electric etc. Co. (84 Fed. 125) | 1244 | v. Corbin (Fed. Cas. No. 11,299) | 53 |
| Platt v. Archer (9 Blatchf. 558, Fed. Cas. No. 11,213) | 365 | Postal Tel. Cable Co. v. Alabama (155 U. S. 482) | 185 |
| v. Archer (13 Blatchf. 351) | 1518 | Postmaster General v. Cross (Fed. Cas. No. 11,306) | 206 |
| v. Philadelphia etc. R. Co. (54 Fed. 569) | 1475 | v. Cross (4 Wash. C. C. 326) | 208 |
| v. Philadelphia etc. R. Co. (65 Fed. 665) | 1515 | Potter v. Beal (60 Fed. 860, 2 C. C. A. 60) | 838, 850, 1113 |
| v. Philadelphia etc. R. Co. (65 Fed. 872) | 1513, 1614 | v. National Bank (102 U. S. 168) | 1009 |
| v. Philadelphia etc. R. Co. (28 C. C. A. 488, 84 Fed. 535) | 1529 | v. Potter (1 Ves. 274) | 974 |
| v. Philadelphia etc. R. Co. (115 Fed. 842) | 1526 | Potts, <i>In re</i> (166 U. S. 263, 17 Sup. Ct. 520) | 1284 |
| Plattsburgh First Nat. Bank v. Woodrum (86 Fed. 1004) | 1234, 1240, 1243 | Poulson, <i>Ez p.</i> (Fed. Cas. No. 11-350) | 1424 |
| Playford v. Lockard (65 Fed. 870) | 477, 588, 611 | Poultnay v. LaFayette (12 Pet. 472) | 422 |
| Pliable Shoe Co. v. Bryant (81 Fed. 521) | 205 | Powden v. Johnson (Fed. Cas. No. 11,353) | 974 |
| Plimpton v. Winslow (9 Fed. 365) | 411 | Powers v. Chesapeake etc. R. Co. (160 U. S. 92) | 176 |
| Plitt, <i>Ez p.</i> (2 Wall. Jr. 453) | 1218 | Pratt v. Burr (Fed. Cas. No. 11,872) | 1804 |
| Plume etc. Mfg. Co. v. Baldwin (87 Fed. 785) | 833 | v. California Min. Co. (24 Fed. 869) | 505 |
| Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber etc. Co. (86 Fed. 538) | 1446, 1452 | v. Law (9 Cranch 456) | 927 |
| v. Klamath River Lumber Co. (96 Fed. 34) | 31 | v. Northam (5 Mason 95) | 87 |
| Polk v. Mutual Reserve Fund L. Assoc. (119 Fed. 491) | 581 | Preferred Acc. Ins. Co. v. Barker (88 Fed. 814, 32 C. C. A. 124) | 191 |
| v. Mutual Reserve Fund L. Assoc. (128 Fed. 524) | 164, | v. Barker (93 Fed. 158, 35 C. C. A. 250) | 188 |
| Pollard v. Dwight (4 Cranch 421) | 408 | Prentice v. Duluth Storage etc. Co. (58 Fed. 487, 7 C. C. A. 298) | 245, 262 |
| v. Wellford (99 Tenn. 120) | 637 | 218 | |
| Pollock v. Farmers' Loan & T. Co. (157 U. S. 428) | 293 | Prentiss Tool etc. Co. v. Godchaux (66 Fed. 234) | 978 |
| Pomfret v. Windsor (2 Ves. 479) | 994 | Presque Isle County v. Ashley (18 Sup. Ct. 940, 189 U. S. 736) | 221 |
| Pomroy v. Harter (1 McLean 448) | 1189 | Press Pub. Co. v. Monroe (164 U. S. 105) | 186 |
| Pond v. Vermont Valley R. Co. (Fed. Cas. No. 11,265) | 502, 567 | Presto, The (35 C. C. A. 394, 98 Fed. 522) | 364 |
| Pool v. Nixon (Fed. Cas. No. 11-270) | 1240, 1255, 1258, 1276, 1277, 1281, 1282, 1284 | Preston v. Finley (72 Fed. 850) | 575 |
| Pooley v. Luco (76 Fed. 146) | 1625 | v. Smith (26 Fed. 884) | 561, 1119 |
| Poor v. Carleton (3 Sumn. 70, Fed. Cas. No. 11,272) | 1362, 1363, 1402, 1407, 1408 | v. Walsh (10 Fed. 315) | 1149 |
| | | Prevost v. Gorrell (Fed. Cas. No. 11-405) | 254 |
| | | v. Gratz (Fed. Cas. No. 11,406) | 1247 |
| | | v. Grants (Fed. Cas. No. 11,407) | 1147 |
| | | Price v. Berrington (7 Eng. L. & Eq. 254) | 141 |
| | | v. Coleman (21 Fed. 857) | 270 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|---|------------------|---|------------|
| Price v. Price (90 Ga. 244)..... | 668 | Putnam v. Timothy Dry Goods etc. Co. (79 Fed. 454) | 826 |
| v. U. S. (174 U. S. 875)..... | 297 | Putney v. Whitmore (66 Fed. 385)..... | 216, 706 |
| Primrose v. Fenno (113 Fed. 376)... | 1190 | | |
| Prince v. Towns (33 Fed. 161)..... | 214 | | |
| Proctor etc. Co. v. Globe Refining Co. 34 C. C. A. 405, 92 Fed. 357).... | 1396 | | |
| Prout v. Roby (15 Wall. 471)....984, | 938 | | |
| v. Starr (188 U. S. 337, 23 Sup. Ct. 398) 991, 1355, 1391 | | | |
| Providence County Sav. Bank v. Frost (8 Ben. 293, Fed. Cas. No. 11,458) | 1655 | | |
| Providence Rubber Co. v. Goodyear (9 Wall. 788)....859, 861, | 958 | | |
| v. Goodyear (9 Wall. 805)....1276, | 1286 | | |
| v. Goodyear (9 Wall. 807, 19 Fed. 587) 628, 633, | 634 | | |
| Provident Sav. L. etc. Soc. v. Loeb (115 Fed. 357).....1316, 1319 | | | |
| Provost v. Pidgeon (9 Fed. 409)... | 375, | | |
| | 411 | | |
| Public Schools v. Walker (9 Wall. 603) | 1232, | Quackenbush v. Lane (Fed. Cas. No. 11,491) | 1633 |
| Puget Sound Bank v. King County (57 Fed. 483) | 562, | Queen Anne's Ferry etc. Co. v. Queen Anne's R. Co. (148 Fed. 41) ..1576, | |
| Pugh v. Fairmont Min. Co. (112 U. S. 238) | 1629, 1631, 1642 | 1587, 1592 | |
| Pulliam v. Cincinnati etc. R. Co (4 Biss. 35, Fed. Cas. No. 11-461) | 1458 | Quinby v. Conlan (104 U. S. 420) ..910, | 934 |
| v. Cincinnati etc. R. Co. (Fed. Cas. No. 11,462) 1229, | 1458 | Quincy v. Steel (120 U. S. 241)....294, | 295 |
| Pulliam v. Pulliam (10 Fed. 23)... | 42 | Quincy etc. R. Co. v. Humphreys (143 U. S. 82).....1477, 1516, | 1529 |
| v. Pulliam (10 Fed. 53)....901, | 111 | Quinton v. Neville (81 C. C. A. 673, 152 Fed. 879) | 1266 |
| Pulman v. Stebbins (51 Fed. 10)... | 254 | Quirk v. Quirk (155 Fed. 199).....52 | |
| Pulliman's Palace Car Co. v. Central Transp. Co. (49 Fed. 261) | 642 | | |
| v. Central Transp. Co. (171 U. S. 138, 18 Sup. Ct. 808)... | 812 | Rae v. Grand Trunk R. Co. (14 Fed. 401) | 659 |
| v. Missouri etc. Co. (55 Fed. 188) | 1370 | Rahley v. Columbia Phonograph Co. (58 C. C. A. 639, 122 Fed. 623) ..1396 | |
| Purcell v. British Land etc. Co. (42 Fed. 465) | 281 | Rahjen's American Composition Co. v. Holzapfel's Compositions Co. (97 Fed. 949) | 1062, 1098 |
| v. Miner (4 Wall. 513)....1256, | 1276, | Railroad Commission Cases (116 U. S. 307, 6 Sup. Ct. 334) | 46 |
| Purefoy v. Purefoy (1 Vern. 28) | 289 | Railroad Companies v. Chamberlain (6 Wall. 748) | 625, 646, |
| Pusey etc. Co. v. Miller (61 Fed. 401) | 1320, | Railway Register Mfg. Co. v. North Hudson Co. R. Co. (26 Fed. 411) | 746 |
| Put-in-Bay Waterworks Co. v. Ryan (181 U. S. 409) | 221 | 1242, 1244 | |
| Putnam v. Commonwealth Ins. Co. (4 Fed. 758) | 909 | Rainer v. Haynes (Hempst. Fed. Cas. No. 11,536) | 1053 |
| v. Day (22 Wall. 60)....1261, | 1265 | Rainey v. Baltimore etc. R. Co. (15 Fed. 767) | 1384 |
| v. New Albany (4 Biss. 865, Fed. Cas. No. 11,481....160, 635, | 641, | v. Herbert (55 Fed. 443, 5 C. C. A. 183) | 209 |
| 641, 750 | | Raisin Fertilizer Co. v. Snell (21 Fed. 353) | 200 |
| | | Ralston v. Sharon (51 Fed. 702) ..744, | 757 |
| | | v. Washington etc. R. Co. (65 Fed. 557) | 1491 |
| | | Ralya Market Co. v. Armour Co. (102 Fed. 580) | 199 |
| | | Ramires v. Mexican Steamship Co. (107 Fed. 530) | 1201 |
| | | Rand v. Walker (117 U. S. 340, 6 Sup. Ct. 769) | 818 |
| | | Randall v. Howard (2 Black 585) ..568, | 1289 |
| | | v. Jaques (Fed. Cas. No. 11-553) | 676 |

TABLE OF CASES.

1883

[References are to pages.]

| | | | |
|---|-------------------|--|------------------|
| Randall <i>v.</i> Phillips (Fed. Cas. No. 11,555) | 977 | Reese <i>v.</i> Zinn (103 Fed. 97).... | 205, 351 |
| <i>v.</i> Venable (17 Fed. 162).... | 72, 1054 | Reeside <i>v.</i> Walker (11 How. 290)... | 297 |
| Randel <i>v.</i> Brown (2 How. 406).... | 1170 | Reeve <i>v.</i> North Carolina etc. Co. (72 C. C. A. 287, 141 Fed. 821)..... | 707 |
| Randolph <i>v.</i> Allen (19 C. C. A. 358, 73 Fed. 28) | 39 | Reeves <i>v.</i> Keystone Bridge Co. (2 B. & A. Pat. Cas. 256, Fed. Cas. No. 11,661).... | 1129, |
| Ranger <i>v.</i> Champion Cotton-Press Co. (52 Fed. 611)..... | 1155 | 1231, 1247, 1250 | |
| Rankin <i>v.</i> Huskisson (4 Sim. 18)... | 1348 | <i>v.</i> Vinacke (Fed. Cas. No. 11,- 663) | 1639 |
| <i>v.</i> Maxwell (2 A. K. Marsh. 488) | 964 | Reid <i>v.</i> McCallister (49 Fed. 16)... | 979 |
| <i>v.</i> Miller (180 Fed. 229)..... | 579 | Reifsneider <i>v.</i> American Imp. Pub. Co. (45 Fed. 433)..... | 403 |
| Ranson <i>v.</i> Winn (18 How. 295).... | 339 | Reinach <i>v.</i> Atlantic etc. R. Co. (58 Fed. 33)..... | 1467 |
| Raphael <i>v.</i> Rio Grande etc. R. Co. (65 C. C. A. 632, 132 Fed. 12) | 1291 | Reinstadler <i>v.</i> Reeves (33 Fed. 308) | 234, 409 |
| <i>v.</i> Trask (194 U. S. 272, <i>affirming</i> 118 Fed. 777).... | 319, | Reissner <i>v.</i> Anness (3 B. & A. Pat. Cas. 148, Fed. Cas. No. 11,- 686) | 515, 516, 517 |
| Rawitzer <i>v.</i> Wyatt (40 Fed. 809)... | 554 | <i>v.</i> Anness (13 Off. Gaz. 7, Fed. Cas. No. 11,687)..... | 541 |
| Raymondville Paper Co. <i>v.</i> St. Gabriel Lumber Co. (140 Fed. 965)..... | 407 | Rejall <i>v.</i> Greenhood (60 Fed. 734)... | 538 |
| <i>Re</i> , see names of parties. | | <i>v.</i> Greenhood (35 C. C. A. 97, 92 Fed. 945) | 545 |
| Read <i>v.</i> Consequa (4 Wash. C. C. 174, Fed. Cas. No. 11,606)... | 382, | Reife <i>v.</i> Rundie (103 U. S. 222)... | 1548 |
| 426, 686, 1401, | 1405 | Remer <i>v.</i> McKay (38 Fed. 164).... | 627 |
| <i>v.</i> Consequa (4 Wash. C. C. 385, Fed. Cas. No. 11,607)... | 426, | Removal Cases (100 U. S. 457)... | |
| <i>v.</i> Haynie (Fed. Cas. No. 11,- 608) | 472 | 349, 351 | |
| Reading Ins. Co. <i>v.</i> Egelhoff (115 Fed. 398)..... | 908, 911, | Republic Iron Min. Co. <i>v.</i> Jones (37 Fed. 721, 2 L.R.A. 746)..... | 200 |
| Ready Roofing Co. <i>v.</i> Taylor (15 Blatchf. 94, Fed. Cas. No. 11,613) ... | 1450 | Rex <i>v.</i> Cole (6 T. R. 640)..... | 786 |
| Reagan <i>v.</i> Aiken (138 U. S. 109)... | 54 | <i>v.</i> Harrison (6 T. R. 60)..... | 786 |
| Reagan <i>v.</i> Farmers L. & T. Co. (154 U. S. 362, 14 Sup. Ct. 1047)... | 46, | <i>v.</i> Jones (1 Stra. 704)..... | 786 |
| 221, | 562 | <i>v.</i> Pierson (Andr. 318)..... | 786 |
| Reavis <i>v.</i> Reavis (98 Fed. 145).... | 351 | Reynes <i>v.</i> Dumont (180 U. S. 395)... | |
| <i>v.</i> Reavis (101 Fed. 19)..... | 541 | 52, 53 | |
| Rector <i>v.</i> Fitzgerald (59 Fed. 808, 8 C. C. A. 277, <i>appeal dismissed</i> 17 Sup. Ct. 998)..... | 1266 | Reynolds <i>v.</i> Crawfordsville etc. Bank, (112 U. S. 405).... | 18, 41, |
| Redfield <i>v.</i> Baltimore etc. R. Co. (124 Fed. 929) | 358 | 485, 492, 493 | |
| Reed <i>v.</i> Lawrence (29 Fed. 915).... | 905 | <i>v.</i> Iron Silver Min. Co. (38 Fed. 354) | 1402 |
| <i>v.</i> Lawrence (32 Fed. 228).... | 1248, | <i>v.</i> Stockton (140 U. S. 254, 11 Sup. Ct. 778)... | 1163, 1558, 1561 |
| <i>v.</i> Munn (148 Fed. 737)..... | 1163 | Rhimelander <i>v.</i> Sanford (3 Day 279) ... | 300 |
| <i>v.</i> Pennsylvania Co. (49 C. C. A. 572, 111 Fed. 714)..... | 364 | Rhino <i>v.</i> Emery (79 Fed. 483)... | 507, |
| <i>v.</i> Stanley (97 Fed. 521, 38 C. C. A. 381)..... | 1266, | 516, 519, 521, 535, 602 | |
| <i>v.</i> Stanley (89 Fed. 480, 38 C. C. A. 381, 97 Fed. 521)... | 1266, | Rhode Island <i>v.</i> Massachusetts (12 Pet. 657) | 298, 409, 502 |
| Reedy <i>v.</i> Western Electric Co. (88 Fed. 708, 28 C. C. A. 27)..... | 955 | <i>v.</i> Massachusetts (14 Pet. 210) 501, 505, 517, 520, 530, 538, | |
| Rees <i>v.</i> Watertown (10 Wall. 107)... | 264 | 535, 538, 543 | |
| Reese, <i>In re</i> (47 C. C. A. 87, 107 Fed. 942)..... | 1480, 1482, 1488, | <i>v.</i> Massachusetts (15 Pet. 288) ... | 568 |
| | 1439 | Ribon <i>v.</i> Chicago etc. R. Co. (16 Wall. 446)..... | 308, 320 |
| | | Rice <i>v.</i> Durham Water Co. (91 Fed. 438) | 882, 886 |
| | | Rich <i>v.</i> Braxton (158 U. S. 375)... | 44 |
| | | <i>v.</i> Bray (2 L.R.A. 225, 37 Fed. 277) | 319 |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|-----------------|--|-------|
| Richards, <i>Ez p.</i> (117 Fed. 658) .. | 381, | Risk <i>v.</i> Kansas etc. Co. (58 Fed. 45) | 1505 |
| 1386, 1387, 1389, 1390, 1392, | 1433 | Rison <i>v.</i> Cribbs (1 Dill. 181, Fed. | |
| Richards <i>v.</i> Chesapeake etc. R. Co. | | Cas. No. 11,860) | 1011 |
| (1 Hughes 28) | 825 | Ritchie <i>v.</i> Burke (109 Fed. 16) .. | 179, |
| v. Halliday (112 Fed. 86, 50 | | v. McMullen (79 Fed. 522, 25 C. | 1269 |
| C. C. A. 183) | 1521, 1533 | C. A. 50) | 639, |
| v. Morris Canal etc. Co. (4 N. | | v. Sayers (100 Fed. 520) | 149 |
| J. Eq. 428) | 1570 | Riverdale Mills <i>v.</i> Mfg. Co. (198 U. | |
| Richardson <i>v.</i> Green (159 U. S. 264, | | 8. 188, 25 Sup. Ct. 629) | 15 |
| 15 Sup. Ct. 1042) | 21 | Roach <i>v.</i> Hulings (5 Cranch C. C. | |
| v. Green (61 Fed. 428, 9 C. C. | | 637, Fed. Cas. No. 11,874) | |
| A. 565) | 18, 21 | 169, 816 | |
| v. Loree (36 C. C. A. 301, 94 | | v. Summers (20 Wall. 165) | 978 |
| Fed. 375) | 559 | Robb <i>v.</i> Vos (155 U. S. 13, 15 Sup. | |
| v. Lowe (79 C. C. A. 317, 149 | | Ct. 4, <i>affirming</i> 36 Fed. 132) | 1290 |
| Fed. 625) | 458, 1278, 1286 | Roberts <i>v.</i> Brooks (71 Fed. 914) | |
| v. Oliver (44 C. C. A. 468, 105 | | 367, 948 | |
| Fed. 277, 53 L.R.A. 113) | 120 | v. Lewis (144 U. S. 653, 12 Sup. | |
| v. Warner (28 Fed. 843) | 1688 | Ct. 781) | 187 |
| Richmond <i>v.</i> Irons (121 U. S. 27, 7 | | v. Reintzell (2 Cranch C. C. | |
| Sup. Ct. 788) | 666 | 285) | 381 |
| Richmond Mica Co. <i>v.</i> De Clyme (90 | | Robertson <i>v.</i> Cease (97 U. S. 646) | |
| Fed. 661) | 1370 | 189, 191, 659, 660 | |
| Richter <i>v.</i> Jerome (128 U. S. 283) .. | 315 | Robinson, <i>Ez p.</i> (19 Wall. 505) | |
| v. Jerome (25 Fed. 679) .. | 1072, | 1423, 1424, 1448 | |
| 1074, 1078, 1082 | | Robinson, <i>Ez p.</i> (144 Fed. 835, 75 | |
| v. Magone (47 Fed. 192) | 1202 | C. C. A. 663) | 1446 |
| v. Union Trust Co. (115 U. S. | | Robinson <i>v.</i> Alabama etc. Mfg. Co. | |
| 55, 5 Sup. Ct. 1162) .. | 1076, | (48 Fed. 12, 56 Fed. 690, | |
| 1078, 1080, 1082 | | 6 C. C. A. 79) | 1631 |
| Ricker <i>v.</i> Powell (100 U. S. 104) .. | | v. Alabama etc. Mfg. Co. (89 | |
| 1260, 1266, 1275, 1276, 1280, 1283, 1285 | | Fed. 218) | 875, |
| Riddle <i>v.</i> Whitehill (135 U. S. 621) .. | 659 | v. American Car etc. Co. (63 C. C. A. 331, 135 Fed. 693, <i>affirming</i> 132 Fed. 165) .. | 497 |
| Ridge <i>v.</i> Manker (67 C. C. A. 596, | | 468, | |
| 132 Fed. 599) | 1545 | v. Brast (149 Fed. 151, 79 C. C. A. 18) | 1318 |
| Ridgeway <i>v.</i> Darwin (7 Ves. Jr. 404) .. | 969 | v. Campbell (3 Wheat. (U. S.) 212) | 62 |
| Ridings <i>v.</i> Johnson (128 U. S. 212) .. | 30 | 5, 9, 18, 31, | |
| Biggs <i>v.</i> Clark (71 Fed. 500, 18 C. C. A. 242) | 207 | v. Cathcart (Fed. Cas. No. 11, 946) | 374 |
| v. Johnson County (6 Wall. 166) | 1446, 1467 | 971, 977, 1407 | |
| v. Union L. Ins. Co. (63 C. C. A. 365, 129 Fed. 207) | 50 | v. Cathcart (Fed. Cas. No. 11, 947) | 1162 |
| Rigney <i>v.</i> De Graw (100 Fed. 213) .. | | 977, | |
| | 149, 667 | v. Cooper (4 Sim. 131) | 966 |
| Rincon etc. Co. <i>v.</i> Anaheim etc. Co. | | v. Fair (9 Sup. Ct. 30, 128 U. S. 53) | |
| 115 Fed. 543) | 257 | 374 | |
| Rindskopf, <i>In re</i> (24 Fed. 542) | | v. Hadley (11 Beav. 614) | 1476 |
| | 1081, 1053 | v. Honstain (79 Fed. 678) | 362 |
| Rindskopf <i>v.</i> Platto (29 Fed. 180) .. | 1119 | v. Philadelphia etc. R. Co. (28 Fed. 340) | 1026, |
| Ringo <i>v.</i> Binns (10 Pet. 269) | 328 | 1027 | |
| Ring Refrigerator etc. Co. <i>v.</i> St. Louis Ice Mfg. Co. (67 Fed. 535) .. | 1230 | v. Philadelphia etc. R. Co. (28 Fed. 577) | 960 |
| Rintoul <i>v.</i> New York Cent. etc. R. Co. (20 Fed. 313) | 1248 | v. Piedmont Marble Co. (75 Fed. 91) | 1637 |
| Bio Grande Irrigation Co. <i>v.</i> Glider-sleeve (174 U. S. 603) | 400 | v. Randolph (4 B. & A. Pat. Cas. 317, Fed. Cas. No. 11,963) | |
| Rio Grande R. Co. <i>v.</i> Gomila (132 U. S. 478) | 179 | 483, 485, | 486 |
| Riser <i>v.</i> Southern R. Co. (116 Fed. 1014) | 1207 | v. Rudkins (28 Fed. 8) | 1183, |
| | | 1255 | |
| | | v. Satterlee (3 Sawy. 134, Fed. Cas. No. 11,967) | 485, |
| | | 486, | 698, |
| | | 779 | |

TABLE OF CASES.

1885

[References are to pages.]

| | | | |
|--|--------------------|--|---------------|
| Robinson <i>v.</i> Scotney (19 Ves. Jr. 582) | 908 | Rouse <i>v.</i> Letcher (156 U. S. 47) .. | 751 |
| <i>v.</i> Taylor (42 Fed. 811) | 1463 | Rowland, <i>Ex p.</i> (104 U. S. 604) .. | 1446 |
| Roche <i>v.</i> Morgell (2 Sch. & Lef. 721) | 535, 594 | Rowley <i>v.</i> Adams (1 Myl. & K. 545) .. | 873 |
| Rodger Ballast Car Co. <i>v.</i> Omaha etc. R. Co. (83 C. C. A. 403, 154 Fed. 629) | 1590 | Roy <i>v.</i> Louisville etc. R. Co. (34 Fed. 276) | 361, 362 |
| Rodgers <i>v.</i> Pitt (89 Fed. 424) .. | 1392, | Royal Metal Mfg. Co. <i>v.</i> Art Metal Works (66 C. C. A. 88, 130 Fed. 778) | 1200 |
| 1444, 1445, 1446, 1451, 1452 | | Royal Trust Co. <i>v.</i> Washburn etc. R. Co. (113 Fed. 531, 71 C. C. A. 579, 139 Fed. 865) | 1550 |
| <i>v.</i> Pitt (96 Fed. 668) | 554, 1467 | Rubber Tire etc. Co. <i>v.</i> Columbia etc. Co. (89 Fed. 593) | 1014 |
| <i>v.</i> Pitt (129 Fed. 932) | 1417 | Rubber-Tire Wheel Co. <i>v.</i> Davie (100 Fed. 85) | 114 |
| Roemer <i>v.</i> Neumann (26 Fed. 332) | 780, 1148, 1173 | Rubel <i>v.</i> Beaver Falls Cutlery Co. (22 Fed. 283) | 378 |
| <i>v.</i> Newman (19 Fed. 98) | 1443 | Euch <i>v.</i> Rock Island (97 U. S. 693) .. | 1099 |
| <i>v.</i> Simon (91 U. S. 149) .. | 1248, | Rude <i>v.</i> Whitchurch (3 Sim. 562) .. | 968 |
| 1252, 1253 | | Ruggles <i>v.</i> Eddy (11 Blatchf. 524) | |
| Rogers <i>v.</i> Linn (2 McLean 126) | 200 | 1244, 1246, 1247 | |
| <i>v.</i> Marshall (12 Fed. 614) | 1251 | <i>v.</i> Patton (74 C. C. A. 450, 143 Fed. 312) | 1608 |
| <i>v.</i> Marshall (13 Fed. 59) .. | 1242, | <i>v.</i> Southern Minnesota R. Co. (Fed. Cas. No. 12,121) .. | 1628, 1632 |
| 1243, 1245, 1246, 1250 | | Ruhleider <i>v.</i> Chesapeake etc. R. Co. (91 Fed. 5, 33 C. C. A. 299) | 1575 |
| <i>v.</i> Marshall (15 Fed. 194) .. | 1243, 1251 | Russel <i>v.</i> The Asa R. Swift (Newberry, Adm. 553) | 70 |
| <i>v.</i> Moore (85 Fed. 920, 29 C. C. A. 636) | 1654 | Russell <i>v.</i> Ashley (Hempst. 549) | 1001 |
| <i>v.</i> Penobscot Min. Co. (83 C. C. A. 380, 154 Fed. 606) .. | 103, | <i>v.</i> Clark (7 Cranch 69) .. | 817, 1125 |
| 245, 249, 318, 333 | | <i>v.</i> Farley (105 U. S. 433) .. | 1383, |
| <i>v.</i> Riesner (31 Fed. 591) | 843 | 1412, 1415, 1416 | |
| <i>v.</i> Riesner (34 Fed. 270) | 1244 | <i>v.</i> McLellan (3 Woodb. & M. 157, Fed. Cas. No. 12,158) .. | 849 |
| <i>v.</i> Riley (80 Fed. 759) | 210, 1542 | <i>v.</i> Stansell (105 U. S. 303) | 215 |
| Romaine <i>v.</i> Union Ins. Co. (28 Fed. 629) | 405, 408, 409, 411 | Rust <i>v.</i> Brittle Silver Co. (58 Fed. 611, 7 C. C. A. 389) | 816 |
| Rondot <i>v.</i> Rogers Tp. (25 C. C. A. 145, 79 Fed. 876) | 204 | Rutherford <i>v.</i> Geddes (4 Wall. 220) .. | 1099 |
| Root <i>v.</i> Lake Shore etc. Co. (105 U. S. 189) | 48, | Rutland Marble Co. <i>v.</i> Ripley (10 Wall. 339) | 1387 |
| <i>v.</i> Woolworth (150 U. S. 401, 14 Sup. Ct. 136) | 750, | Rutledge <i>v.</i> Waldo (94 Fed. 265) | 1318 |
| 1310, 1311 | | Ryan <i>v.</i> Seaboard etc. R. Co. (89 Fed. 385) | 1354 |
| Rosenbaum <i>v.</i> Council Bluffs Ins. Co. (37 Fed. 724, 3 L.R.A. 189) | 747 | <i>v.</i> Seaboard etc. R. Co. (89 Fed. 397) | 208, 246, 554 |
| Rosenthal <i>v.</i> McGraw (71 C. C. A. 277, 138 Fed. 721) | 1568, 1604 | <i>v.</i> Williams (100 Fed. 177) | 1370 |
| Ross <i>v.</i> Duval (13 Pet. 45) | 181 | Ryder <i>v.</i> Bateman (93 Fed. 16) | |
| <i>v.</i> Ft. Wayne (58 Fed. 404) .. | 115, | 1460, 1463, 1480, 1481 | |
| 725 | | <i>v.</i> Bateman (93 Fed. 31) .. | 1113, |
| <i>v.</i> Ft. Wayne (63 Fed. 466, 11 C. C. A. 288, reversing 58 Fed. 404) .. | 713, 714, | 1132, 1134, 1135, 1137 | |
| <i>v.</i> Gibson (Fed. Cas. No. 12, 074) | 468 | | |
| <i>v.</i> Prentiss (Fed. Cas. No. 12, 078) | 1261, 1266, | | |
| 1271, 1275 | | | |
| Rosend Castle, The (30 Fed. 462) .. | 1201 | | |
| Rothwell <i>v.</i> Dewees (2 Black 613) .. | 828 | | |
| Rouse <i>v.</i> Hornsby (161 U. S. 588, 16 Sup. Ct. 610) | 1550 | Sackville <i>v.</i> Ayleworth (1 Vern. 105) .. | 116 |
| <i>v.</i> Hornsby (67 Fed. 210, 14 C. C. A. 377) | 839, 925, | Safford <i>v.</i> Ensign Mfg. Co. (56 C. C. A. 630, 120 Fed. 480) | 1119, 1125 |
| 926, 1576 | | Sage <i>v.</i> Central R. Co. (93 U. S. 412) .. | 1178 |

S.

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|------------------------|---|------------------------------------|
| Sage v. Central R. Co. (98 U. S. 712) | 825, 1161 | Samples v. City Bank (1 Woods 523, Fed. Cas. No. 12,278) | 611 |
| v. Central R. Co. (99 U. S. 384) | 1165, 1645, 1650 | Sampson etc. Co. v. Seaver Radford Co. (129 Fed. 761) | 1372, 1384 |
| v. Memphis etc. R. Co. (125 U. S. 361, 8 Sup. Ct. 887).... | 1458, 1462, 1482, 1585 | Samuel v. Holladay (Fed. Cas. No. 12,288) | 1628 |
| v. Memphis etc. R. Co. (5 McCrary 643, 18 Fed. 571).... | 1615 | v. Hostetter Co. (55 C. C. A. 111, 118 Fed. 257).... | 1088, 1098 |
| v. St. Paul etc. R. Co. (47 Fed. 3) | 1312 | Sanders v. Bluefield Waterworks etc. Co. (45 C. C. A. 475, 106 Fed. 587) | 1162 |
| Sahlgard v. Kennedy (13 Fed. 242) | 314 | v. Devereux (8 C. C. A. 629, 60 Fed. 311) | 40, 817, 940 |
| Sahlgard v. Kennedy (2 Fed. 295)... | 1257, 1288 | v. King (6 Madd. 61) | 592, 601 |
| Saint v. Guerriero (17 Colo. 448, 30 Pac. 335) | 257 | v. Riverside (118 Fed. 720, 55 C. C. A. 240) | 890, 917 |
| St. Clair v. Cox (106 U. S. 353)... | 373 | Sandford v. Embry (81 C. C. A. 167, 151 Fed. 977) | 897, 917 |
| St. Colombe v. U. S. (7 Pet. 625)... | 849 | v. Poe (60 L.R.A. 641, 16 C. C. A. 305, 69 Fed. 546) | 213 |
| St. Joseph etc. R. Co. v. Humphreys (145 U. S. 105, 12 Sup. Ct. 795) | 1523 | San Diego Flume Co. v. Souther (32 C. C. A. 548, 90 Fed. 164, 44 C. C. A. 143, 104 Fed. 706)..... | 646, 647 |
| St. Lawrence, The (1 Black 522)... | 78 | Sands v. Greeley (83 Fed. 772).... | 904 |
| St. Louis v. Knapp (104 U. S. 658)... | 105 | v. Greeley (31 C. C. A. 424, 88 Fed. 180).... | 1502, 1552, 1554, 1557, 1560, 1561 |
| St. Louis etc. R. Co. v. Cleveland etc. R. Co. (125 U. S. 658)... | 1585 | v. Greely (80 Fed. 195) | 822 |
| v. Continental Trust Co. (49 C. C. A. 529, 111 Fed. 669)... | 1488, 1588, 1592 | Sanford v. Savings etc. Soc. (80 Fed. 54) | 976 |
| v. Dewees (23 Fed. 519) | 1459 | Sanford Fork etc. Co. In re (160 U. S. 247, 16 Sup. Ct. 291).... | 473, 489, 492, 1284 |
| v. Gill (156 U. S. 649) | 46, | Sanford Fork etc. Co. v. Howe (157 U. S. 312) | 489, 492 |
| v. Hadley (153 Fed. 220) | 705 | Sanger v. Nightingale (122 U. S. 176, 7 Sup. Ct. 1109) | 1639 |
| v. James (161 U. S. 545).... | 196, | Sang Lung v. Jackson (85 Fed. 502) | 261 |
| v. McBride (11 Sup. Ct. 982, 141 U. S. 127) | 232, 401 | Sanitary Reduction Works v. California etc. Co. (94 Fed. 698).... | 1366, 1375 |
| v. Newcom (56 Fed. 951, 6 C. C. A. 172) | 179, | San Joaquin etc. Co. v. Stanislaus County (90 Fed. 516) | 186 |
| v. Terre Haute etc. R. Co. (33 Fed. 440) | 146, 150, | Santissima Trinidad (7 Wheat. 353) | 298 |
| v. Wabash R. Co. (81 C. C. A. 643, 152 Fed. 849).... | 1313 | Saranac, The (132 Fed. 988) | 1093 |
| St. Louis Southwestern R. Co. v. Holbrook (19 C. C. A. 385, 73 Fed. 112) | 1549, 1576 | Sargeant v. First Nat. Bank (Fed. Cas. No. 12,359) | 1012 |
| St. Louis Trust Co. v. Riley (70 Fed. 32, 30 L.R.A. 456, 16 C. C. A. 610) | 1577 | Sargent v. Larned (2 Curt. C. C. 340, Fed. Cas. No. 12,364) | 978 |
| St. Louis Type Foundry v. Carter etc. Co. (31 Fed. 524).... | 1351, 1355, 1401 | Savage v. Worsham (104 Fed. 18).... | 25, 102 |
| St. Paul etc. R. Co. v. Northern Pac. R. Co. (49 Fed. 306, 1 C. C. A. 246) | 1368 | v. Worsham (104 Fed. 18, Case 2) | 665 |
| Salem First Nat. Bank v. Salem Capital Flour-Mills Co. (31 Fed. 580) | 743, 746 | Savannah etc. R. Co. v. Jacksonville etc. R. Co. (24 C. C. A. 489, 79 Fed. 35) | 1528 |
| Salmon Falls Mfg. Co. v. Tangier (8 Ware 110) | 793 | Savery v. Sypher (6 Wall. 157) | 1651 |
| Salvidge v. Hyde (5 Madd. 146).... | 246 | Savill v. Roberts (1 Salk. 18).... | 1186 |
| Sampeyreal v. U. S. (7 Pet. 222)... | 1259, 1272 | Savin, Petitioner (181 U. S. 267).... | 1424, 1426, 1434 |

[References are to pages.]

| | | | |
|--|---------------------|---|-----------|
| Savings etc. Co. v. Bear Valley Co. (112 Fed. 693)..... | 458, 459, 580, 828 | Scott v. Armstrong (146 U. S. 499, 18 Sup. Ct. 148, reversing 36 Fed. 63) | 8, 1589 |
| Savings etc. Soc. v. Davidson (88 C. C. A. 865, 97 Fed. 696)..... | 974, 976, 977 | v. Blaine (Baldw. 287) | 1232 |
| Sawyer, <i>In re</i> (124 U. S. 200, 8 Sup. Ct. 482) | 24, 1446, 1447 | v. Clinton etc. R. Co. (6 Bisa. 537) | 91 |
| Sawyer v. Atchison etc. R. Co. (63 C. C. A. 602, 129 Fed. 100, 119 Fed. 252) | 83 | v. Donald (165 U. S. 58)..... | 207 |
| v. Concordia Parish (12 Fed. 754) | 183 | v. Donald (165 U. S. 107, 17 Sup. Ct. 262) | 205, 1390 |
| v. Gill (3 Woodb. & M. 97, Fed. Cas. No. 12,399) | 382 | v. Farmers' L. & T. Co. (16 C. C. A. 358, 69 Fed. 17).... | 1485 |
| v. Kellogg (9 Fed. 601)..... | 1197 | v. Hoover (99 Fed. 247)..... | 232 |
| v. Kochersperger (170 U. S. 303)..... | 182 | v. Hore (1 Hughes 163, Fed. Cas. No. 12,535) | 1232 |
| v. Piper (188 U. S. 157)..... | 694 | v. Milliken (80 Ill. 108)..... | 637 |
| v. Prickett (19 Wall. 146)..... | 1639 | v. Neely (140 U. S. 106) ..7, 20, 33, 38, 42, | 62 |
| Sayles v. Erie R. Co. (Fed. Cas. No. 12,418) | 483 | v. Sandford (19 How. 393).... | 176, 528 |
| Saylor v. Taylor (28 C. C. A. 348, 77 Fed. 476) | 71 | v. The Young America (Newb. Adm. 107) | 70 |
| Scammon v. Hobson (1 Haskell 406, Fed. Cas. No. 12,484)..... | 985, 1011 | Scripps v. Campbell (Fed. Cas. No. 12,562) | 1202 |
| Schacker v. Hartford Ins. Co. (93 U. S. 241) | 208 | Scriven v. North (67 C. C. A. 348, 134 Fed. 368) | 1161 |
| Schaumburg v. U. S. (108 U. S. 667)..... | 297 | Scruggs v. Memphis etc. R. Co. (108 U. S. 368) | 1486 |
| Scheck v. Kelly (95 Fed. 941)..... | 1411 | Seaman v. Northwestern Mut. L. Ins. Co. (30 C. C. A. 212, 86 Fed. 498) 845, 846, 847, 848, | 857 |
| Schenck v. Conover (13 N. J. Eq. 227) | 1808 | Searcy v. Pannell (Fed. Cas. No. 12- 584) | 974 |
| v. Peay (Woolw. 175, Fed. Cas. No. 12,450) ..887, 743, 744, 1460 | | Searies v. Jacksonville etc. R. Co. (2 Woods 621, Fed. Cas. No. 12,586) 1347 | |
| Schermehorn v. L'Espenasse (2 Dall. 360, Fed. Cas. No. 12,454) 1405 | | Searis v. Worden (13 Fed. 716).... | 1450 |
| Schindelholz v. Culum (55 Fed. 885, 5 C. C. A. 293) | 1465 | Seattle etc. R. Co. v. Union Trust Co. (24 C. C. A. 512, 79 Fed. 179).. 64, 77, 373, 379, 662, 1662 | |
| Schmidt v. Thomas (33 Ill. App. 109)..... | 100 | Seaver v. Bigelow (5 Wall. 208)... | |
| v. West (104 Fed. 272)..... | 30, | 216, 217 | |
| Schnauffer v. Aste (148 Fed. 867)... | 516, 518, | Seaward v. Paterson (1 Ch. 545, 76 L. T. N. S. 215) | 1481 |
| Schneider v. Thill (3 Fed. 95)..... | 1237 | Seccomb v. Wurster (88 Fed. 856)... | |
| Schofield v. Horse Springs Cattle Co. (65 Fed. 433) | 947, 954, | 326, 1370 | |
| Scholienberger, <i>Ez p.</i> (96 U. S. 369) | 956 | Secor v. Singleton (9 Fed. 809) ..453, | 575 |
| 229, | 233 | v. Singleton (85 Fed. 376).... | 1427 |
| Schulenberg-Boeckeler Lumber Co. v. Hayward (20 Fed. 422) ..45, 265, | 847 | v. Singleton (41 Fed. 725) .. | 1311 |
| Schultz v. Phenix Ins. Co. (77 Fed. 875, reversed 25 C. C. A. 453, 80 Fed. 337)..... | 471, 649, 698, 1388 | Secretary v. McGarrahan (9 Wall. 298) | 26 |
| Schultze v. Holtz (82 Fed. 448)... | 974 | Security Sav. etc. Assoc. v. Buchanan (14 C. C. A. 97, 66 Fed. 799) .. | |
| Schunk v. Moline etc. Co. (147 U. S. 504) | 210 | 269, 273 | |
| Schwartz v. Duss (187 U. S. 8).... | 915 | Sedam v. Williams (4 McLean 51, Fed. Cas. No. 12,609) | 1635 |
| Schwartz, <i>In re</i> (14 Fed. 787)..... | 1441 | Seeley v. Kansas City Star Co. (71 Fed. 554) | 1055 |
| Schwarz v. Kennedy (150 Fed. 316)..... | 955 | Segee v. Thomas (3 Blatchf. 11, Fed. Cas. No. 12,633) 153, 382, | |
| Schwed v. Smith (106 U. S. 188)... | 216 | 409, 567 | |
| Scotland, The (118 U. S. 507, 6 Sup. Ct. 1174) | 1223 | Seitz v. Mitchell (94 U. S. 580) ..979, | 981 |

[References are to pages.]

| | |
|---|--|
| Seligman v. Santa Rosa (81 Fed. 524) | Sheffield etc. R. Co. v. Gordon (151 U. S. 285, 14 Sup. Ct. 343) |
| 431, 757 | 856, 880, 890, 897, 898 |
| Selma First Nat. Bank v. Colby (21 Wall. 609) | Sheffield Canal Co. v. Sheffield etc. R. Co. (1 Phil. 484) |
| 1488 | 1138 |
| Selt, The (8 Biss. 344, Fed. Cas. No. 12,649) | Sheffield Furnace Co. v. Witherow (149 U. S. 574, 13 Sup. Ct. 936) |
| 70, 78 | 946 |
| Seney v. Wabash etc. R. Co. (150 U. S. 310, 14 Sup. Ct. 94) | Sheildley v. Aultman (18 Fed. 666) 1010 |
| 1528 | |
| Sergeant v. Biddle (4 Wheat. 508) 1042 | Sheirburn v. De Cordova (24 How. 423) |
| Seybert v. Shamokin etc. R. Co. (110 Fed. 810) | 8 |
| 893 | |
| Seymour v. Chicago etc. R. Co. (Fed. Cas. No. 12,685) | Sheldon v. Keokuk etc. Co. (8 Fed. 769) |
| 289 | 254 |
| Seymour v. Long Dock Co. (17 N. J. Eq. 169) | Shellabarger v. Oliver (64 Fed. 306) 1055 |
| 671 | |
| v. McCormick (19 How. 96) | Shelton v. Platt (139 U. S. 591) |
| 1197 | 45 |
| v. Phillips etc. Constr. Co. (Fed. Cas. No. 12,689) | v. Van Kleeck (106 U. S. 532, 1 Sup. Ct. 491) |
| 71 | 561, 1258, |
| v. White County (34 C. C. A. 240, 92 Fed. 115) | 1261, 1265, 1272 |
| 1285, 1287 | |
| Shainwald v. Davids (69 Fed. 687) 757 | Shephard, <i>In re</i> (3 Fed. 12) |
| v. Lewis (5 Fed. 517) | 1103, 1105, 1112 |
| 391 | |
| v. Lewis (8 Fed. 878) | Shepherd v. Lloyd (2 Y. & J. 490) |
| 1492 | 567 |
| v. Lewis (46 Fed. 839) | v. May (115 U. S. 505, 6 Sup. Ct. 119) |
| 1332, 1334 | 1860 |
| v. Lewis (69 Fed. 487) | v. Pepper (133 U. S. 626, 10 Sup. Ct. 438) |
| 572, 725, 737, 739, 1310, 1812 | 1648, 1659, |
| Shankwiler v. Reading (4 McLean 240) | 1662, 1663 |
| 1078 | |
| Shepleigh v. Chester etc. Co. (47 Fed. 848) | Shepley v. Cowan (91 U. S. 330) |
| 1029, 1062 | 25 |
| Sharon v. Hill (22 Fed. 28) | Sheppard v. Akers (1 Tenn. Ch. 326) |
| 554, 1142 | 474 |
| v. Hill (23 Fed. 353) | v. Graves (14 How. 505) |
| 190 | 502 |
| v. Hill (26 Fed. 341) | Sheredine v. Gaul (2 Dall. 190) |
| 538 | 1200 |
| v. Terry (1 L.R.A. 572, 36 Fed. 337) | Sherman v. Clark (Fed. Cas. No. 12, 763) |
| 212, 1467 | 207 |
| Sharp v. Pike (5 B. Mon. 155) | Shewell v. Jones (2 Sim. & St. 170) |
| 637 | 1569, 1570 |
| v. Relsaner (9 Fed. 445) | Shields v. Barrow (17 How. 130) |
| 505 | 147, 148, 151, 310, 318, 319, |
| v. Whiteside (19 Fed. 156) | 332, 333, 634, 636, 638, 665, |
| 1289 | 666, 747, 823 |
| Shaw, <i>Ex p.</i> (12 Sup. Ct. 935, 145 U. S. 444) | v. Coleman (157 U. S. 168, 15 Sup. Ct. 570) |
| 403 | 1467, 1483, 1616 |
| v. Bill (95 U. S. 10) | v. Thomas (17 How. 3) |
| 379 | 214 |
| v. Little Rock etc. R. Co. (100 U. S. 605) | v. Thomas (18 How. 253) |
| 315, 1593 | 246, 271, 408, 1295, 1310 |
| v. Millaaps (50 Miss. 380) | Shingleur v. Jenkins (111 Fed. 452) |
| 687 | 319 |
| v. Quincy Min. Co. (145 U. S. 444) | Shinkle etc. Co. v. Louisville, etc. R. Co. (62 Fed. 690) |
| 191, 198, 234 | 1366 |
| Shea v. Nilima (133 Fed. 209, 66 C. C. A. 263) | Shinney v. North American etc. Co. (97 Fed. 9) |
| 1396 | 1464, 1482, 1552, 1554 |
| v. Shea (121 Pa. 302, 1 L.R.A. 422) | Shipbrook v. Hinchinbrook (18 Ves. Jr. 393) |
| 1152 | 773 |
| Shearson v. Littleton (105 Fed. 583) | Shipp v. Williams (62 Fed. 4, 10 C. C. A. 247) |
| 330 | 316, 349 |
| Sheehy v. Mandeville (6 Cranch 253) | Shirk v. LaFayette (52 Fed. 857) |
| 32 | 316 |
| Sheffey v. Lewisburg Bank (33 Fed. 315) | Shoemaker v. National Mechanics' Bank (2 Abb. (U. S.) 416) |
| 1241 | 1366 |
| Sheffield etc. Coal etc. Co. v. Newman (77 Fed. 787, 23 C. C. A. 459) | Short v. Hepburn (21 C. C. A. 252, 75 Fed. 113) |
| 505, 567, 654, 709, 721 | 554 |
| | Shuford v. Cain (1 Abb. (U. S.) 302) |
| | 200 |
| | Shute v. Morley Sewing Mach. Co. (12 C. C. A. 350, 64 Fed. 368) |
| | 1171 |
| | Shutte v. Thompson (15 Wall. 159) 1008 |

TABLE OF CASES.

1889

[References are to pages.]

| | |
|---|---|
| Sibbald v. U. S. (12 Pet. 488).1282, 1284 | Smith v. Alexander (146 Fed. 106) 1369 |
| Sickels v. Borden (Fed. Cas. No. 12-833) | v. American Nat. Bank (32 C. C. A. 368, 69 Fed. 832)..... 27 |
| v. Mitchell (Fed. Cas. No. 12-835) | v. Atchison etc. R. Co. (64 Fed. 1) 231, 236 |
| v. Youngs (2 Blatchf. 293, Fed. Cas. No. 12,838)..... 934 | v. Babcock (3 Sumn. 583, Fed. Cas. No. 13,008) 691 |
| Sickles v. Gloucester Co. (3 Wall. Jr. 186) | v. Babcock (2 Woodb. & M. 246, Fed. Cas. No. 13,009)..... 110 |
| Sidway v. Missouri Land etc. Stock Co. (116 Fed. 381)..... 672, 1391 | v. Baker (1 B. & A. Pat. Cas. 117, Fed. Cas. No. 13,010) 731 |
| Sill v. Solberg (6 Fed. 469)..... 28 | v. Barnes (1 Dick. 67)..... 675 |
| Silsby v. Foote (20 How. 385).... 934 | v. Bourbon County (127 U. S. 105) 278 |
| Simmons, <i>Ex p.</i> (Fed. Cas. No. 12,864) 527 | v. Burnham (2 Sumn. 612).... 128 |
| Simmons v. Baynard (80 Fed. 532) 299, 301 | v. Fifield (33 C. C. A. 681, 91 Fed. 561) 200 |
| v. Burlington etc. R. Co. (159 U. S. 278) 1648 | v. Fort Scott etc. R. Co. (99 U. S. 398) 18, 42 |
| Simms v. Guthrie (9 Cranch 19) | v. Jackson (1 Paine 490, Fed. Cas. No. 13,065) 652 |
| 326, 1162 | v. Kernochan (7 How. 198).... 218, 226, 502 |
| Simon v. House (46 Fed. 817) ... 209, | v. Lee (77 Fed. 779) .. 316, 326, 333 |
| 221, 227 | v. Lyon (183 U. S. 315, 10 Sup. Ct. 303).... 186, 230, 349, 393 |
| Simpson v. Baker (2 Black 581) .. 898 | v. McCullough (104 U. S. 25) .. 1485, 1519 |
| v. Fogo (1 Johns. & H. 23).... 168 | v. M'Iver (9 Wheat. 532)..... 1466 |
| v. Union Stock Yards Co. (110 Fed. 799) | v. McKay (161 U. S. 355)..... 175 |
| Sims v. Hundley (6 How. 1).... 218, 502 | v. Northern Pac. R. Co. (110 Fed. 341) 1055 |
| v. Lyle (4 Wash. C. C. 301, Fed. Cas. No. 12,891) .. 534, 588, 599 | v. Portland (30 Fed. 734)..... 315 |
| Singer Mfg. Co. v. McCollum (24 Fed. 667) | v. Schwed (6 Fed. 455)..... 1858 |
| v. Union Buttonhole etc. Co. (6 Fisher Pat. Cas. 480).... 1366 | v. Swormstedt (16 How. 288) .. 337, 342 |
| Single v. Scott Paper Mfg. Co. (55 Fed. 553) | v. Taggart (87 Fed. 94, 30 C. C. A. 568) 1560, 1561 |
| Sioux City etc. Co. v. Trust Co. (27 C. A. 78, 82 Fed. 124, 49 U. S. App. 523, 173 U. S. 98) .. 318, 327, 330, 751, 794 | v. The Serapis (49 Fed. 398, <i>decrees affirmed</i> , 51 Fed. 91) 1098 |
| Sioux City etc. R. Co. v. Chicago etc. R. Co. (27 Fed. 770)..... 1406 | v. Weeks (3 C. C. A. 644, 53 Fed. 758) 1285 |
| Sioux City First Nat. Bank v. Peavy (75 Fed. 156) | v. Western Union Tel. Co. (81 Fed. 242) 1192, 1207 |
| Sioux Falls Nat. Bank v. Swenson (48 Fed. 621) | v. Woolfolk (115 U. S. 143, 5 Sup. Ct. 1177).... 380, 387, 388, 620, 682, 726, 1169 |
| Siren, The (7 Wall. 154)..... 297 | |
| Sizer v. Many (16 How. 98) .. 1198, 1222 | |
| Skiddy v. Atlantic etc. R. Co. (8 Hughes 320) | Smith Purifier Co. v. McGroarty (186 U. S. 237) 1626 |
| Slack v. Walcott (8 Mason 508, Fed. Cas. No. 12,982) | Smithson v. Hubbell (81 Fed. 593) 216 |
| Slater v. Banwell (50 Fed. 150) ... 477, 1180 | Smyth v. Ames (169 U. S. 466, 18 Sup. Ct. 418) .. 30, 46, 47, 261 |
| v. Maxwell (6 Wall. 268).... 976 | v. Ames (171 U. S. 361, 18 Sup. Ct. 888) 46 |
| Slaughter-House Cases (10 Wall. 273) 1395 | v. New Orleans etc. Co. (141 U. S. 656) 567 |
| Sleesinger v. Buckingham (17 Fed. 454) | Snead v. McCoull (12 How. 407) .. 655 |
| Silver v. Shelback (1 Dall. 165).... 899 | Snively v. Loomis Coal Co. (80 Fed. 204) 1579 |
| Small v. Peters (104 Fed. 401) 646, 811 | |
| Smith, <i>Ex p.</i> (94 U. S. 453)..... 176 | |
| Eq. Prac. Vol. III.—119. | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|---------------------------------------|---|-------------------|
| Snow v. Haslewood (157 Fed. 898)... | 984 | South Penn Oil Co. v. Calf Creek Oil etc. Co. (140 Fed. 507)..... | 266, 747 |
| v. Phillips (1 Sid. pt. 1, p. 220)..... | 963 | South Side R. Co. <i>In re</i> (Fed. Cas. No. 18,190) | 1443 |
| Snyder v. DeForest Wireless Tel. Co. (154 Fed. 142) | 579 | Southwestern Tel. etc. Co. v. Robin- son (48 Fed. 769, 1 C. C. A. 91) | 191 |
| v. Marks (100 U. S. 189)..... | 45 | Sowles v. National Union Bank (82 Fed. 139) | 1518, 1567 |
| v. Pharo (25 Fed. 398)..... | 8 | v. Plattsburgh First Nat. Bank (100 Fed. 552)..... | 51 |
| Snyders v. Armstrong (27 Fed. 18) | 1539 | v. Plattsburgh First Nat. Bank (133 Fed. 846)..... | 1247 |
| Société Anonyme, etc. v. Western Dis- tilling Co. (42 Fed. 98)..... | 1426 | Spalding v. Dodge (6 Mackey 289) | 95 |
| Society of Shakers v. Watson (87 U. S. App. 141, 15 C. C. A. 622, | 794 | Spanish Consol., Matter of (1 Ben. 225) | 1089 |
| v. Watson (77 Fed. 512, 23 C. C. A. 268)..... | 1273, 1274, 1276, 1277, 1285, 1287 | Sparhawk v. Yerkes (142 U. S. 1) | 1529 |
| Socola v. Grant (16 Fed. 487) | 105, 571 | Spark v. Pico (Fed. Cas. No. 18,211) | 1639 |
| Soderberg v. Armstrong (116 Fed. 709) | 544 | Spaulding v. Evenson (149 Fed. 913) | 842 |
| South etc. Alabama R. Co. <i>Eg p.</i> (95 U. S. 225) | 646 | Spear v. Place (11 How. 522) | 215 |
| Southard v. Russell (16 How. 569) | 1273, 1274, 1285 | Speer v. Kearney County (88 Fed. 749, 32 C. C. A. 101) | 817 |
| South Dakota v. North Carolina (192 U. S. 286)..... | 298, 324, 328 | Speldele v. Henrici (7 Sup. Ct. 610, 120 U. S. 377, <i>affirming</i> 15 Fed. 753) | 568 |
| Southerland v. Lake Superior Ship etc. Co. ([1872] MS.) | 1596 | Speigle v. Meredith (4 Biss. 120) | 193 |
| Southern Bldg. etc. Assoc. v. Carey (117 Fed. 325) | 999, 1175 | Spencer v. Dupian Silk Co. (191 U. S. 528) | 186 |
| Southern California Motor-Road Co. v. Union L. & T. Co. (12 C. C. A. 215, 64 Fed. 480) | 1806 | v. London etc. R. Co. (8 Sim. 198) | 1848 |
| Southern Development Co. v. Silva (89 Fed. 418) | 1248 | Sperry v. Erie R. Co. (6 Blatchf. 425, Fed. Cas. No. 13,237) | 816 |
| Southern Dist. of Ohio (2 Bond 483, Appendix) | 362 | Sperry etc. Co. v. Brady (134 Fed. 691) | 1862 |
| Southern Express Co. v. Memphis etc. R. Co. (8 Fed. 799) | 1879 | v. Mechanics' etc. Co. (128 Fed. 1016) | 1397, 1401, 1403 |
| v. Todd (5 C. C. A. 432, 56 Fed. 104) | 229, 282, 408 | Spies v. Chicago etc. R. Co. (6 L.M.A. 565, 40 Fed. 84) | 142, 181 |
| v. Western N. Carolina etc. R. Co. (99 U. S. 191) | 1526, 1545 | Spill v. Celluloid Mfg. Co. (22 Fed. 94) | 1277 |
| Southern Land-Imp. Co. v. Merril- wether (76 Fed. 624, 22 C. C. A. 480) | 751 | Spofford, <i>In re</i> (62 Fed. 448) | 1083 |
| Southern Pac. Co. v. Denton (146 U. S. 202, 18 Sup. Ct. 44) | 191, 288, 284 | Spokane St. R. Co. v. Spokane Falls (46 Fed. 822) | 1870 |
| v. Earl (82 Fed. 690, 27 C. C. A. 185) | 1875, 1896 | Spokes v. Grosvenor Hotel Co. (1897 2 Q. B. 124) | 1129 |
| Southern Pac. R. Co. v. California (118 U. S. 109) | 184 | Spoor v. Riverside County (115 Fed. 26) | 1219 |
| v. Goodrich (57 Fed. 879) | 20 | Sprague v. Litherberry (Fed. Cas. No. 18,261) | 682 |
| v. Oakland (58 Fed. 50) | 1878 | Spreen v. Delaingmore (49 Fed. 71) | 402 |
| v. Temple (59 Fed. 17) | 950, 951 | Spring v. Domestic Sewing Mach. Co. (18 Fed. 446) | 1228 |
| v. U. S. (200 U. S. 341) | 12, 58, 1119 | v. South Carolina Ins. Co. (8 Wheat. 268) | 985, 1816, 1824 |
| Southern R. Co. v. Carnegie Steel Co. (176 U. S. 257, 20 Sup. Ct. 347, <i>affirming</i> 22 C. C. A. 289, 76 Fed. 492) | 1575, 1585, 1589, 1592 | Springfield Co. v. Ely (44 Fla. 319) | 663 |
| | | Springfield Milling Co. v. Barnard etc. Mfg. Co. (81 Fed. 261, 26 C. C. A. 389) | 28, 618, 626, 632 |
| | | Stafford v. Brown (4 Paige 88) | 181 |
| | | v. King (32 C. C. A. 536, 90 Fed. 136) | 1355, 1897 |
| | | Stafford Nat. Bank v. Sprague (8 Fed. 377) | 244, 273 |

TABLE OF CASES.

1891

[References are to pages.]

| | | | | |
|--|--|--|---|------------------|
| Standard Oil Co. v. Hawkins (74 Fed. 395, 20 C. C. A. 468, 33 L.R.A. 789) | 1508 | Stein v. Bienville Water Supply Co. (32 Fed. 876)..... | 1374 | |
| Standard Sugar Refinery v. Castano (43 Fed. 279)..... | 210 | v. Bowman (18 Pet. 209)..... | 1043 | |
| Standley v. Roberts (59 Fed. 836, 8 C. C. A. 305)..... | 16, 1154, 1817, 1819 | Steiness v. Franklin County (14 Wall. 18) | 1242 | |
| Stanley v. Albany Comdy (5 Fed. 254) | 200 | Stephens v. Hemill (22 Wall. 329).... | 327 | |
| v. Albany County (15 Fed. 483) | 213 | Stephens v. McCargo (9 Wheat. 502) | 249 | |
| v. Schwalby (162 U. S. 269) | 297 | Stern v. Wisconsin Cent. R. Co. (1 Fed. 555)..... | 1686 | |
| Stanton v. Alabama etc. R. Co. (2 Woods 506, Fed. Cas. No. 18,298, 81 Fed. 585)..... | 898, | Sterrick v. Pugley (1 Flipp. 850, Fed. Cas. No. 18,379)..... | 780 | |
| 911, 1494, 1594, 1596, 1597, 1598 | v. Alabama etc. R. Co. (2 Woods 523, Fed. Cas. No. 18,297) | 1655 | Stevens v. Gladding (17 How. 455) | 140 |
| v. Embrey (98 U. S. 548) | 16, | v. Grand etc. Co. (67 C. C. A. 284, 183 Fed. 28)..... | 119 | |
| 554, 1627 | v. Memphis etc. R. Co. (104 Fed. 934) | 1106 | v. Missouri etc. Co. (104 Fed. 937) | 1048, 1050, 1078 |
| v. Hatfield (1 Keen 858) | 1218 | v. Missouri etc. Co. (106 Fed. 771, 45 C. C. A. 611) | 1369 | |
| v. Shipley (27 Fed. 498) | 200 | v. New York etc. Co. (18 Blatchf. 412, Fed. Cas. No. 18,406) | 1634, 1655 | |
| Star etc. Co. v. Klahn (145 Fed. 884) | 560, 580 | v. Railroads (4 Fed. 97) | 806, | |
| Stark v. Starr (94 U. S. 477) | 279 | 807, 810, 812, 813 | | |
| Starkweather v. Williams (21 R. I. 55, 41 Atl. 1003) | 474 | Steward, In re (29 Fed. 518) | 1021 | |
| Starr v. Chicago, etc. R. Co. (110 Fed. 8) | 177 | Stewart v. Chesapeake etc. Canal Co. (1 Fed. 361) | 828 | |
| State v. Baldwin (5 Sup. Ct. 278, 112 U. S. 490) | 351 | v. Dunham (5 Sup. Ct. 1168, 115 U. S. 61) | 784 | |
| v. Port Royal etc. R. Co. (84 Fed. 67) | 1548 | v. Masterson (181 U. S. 181) | 559, 569 | |
| Stateeler v. California Nat. Bank (77 Fed. 48) | 1443, 1446, 1548 | v. Smith (2 Cranch C. C. 615, Fed. Cas. No. 18,496) | 948 | |
| State Trust Co. v. Kansas City etc. R. Co. (110 Fed. 10) | 1473 | v. The Sun (36 Fed. 307) | 361 | |
| v. Kansas City etc. R. Co. (120 Fed. 398) | 1634, 1656 | v. Townsend (41 Fed. 121) | 1067, 1086, 1092 | |
| v. Kansas City etc. R. Co. (128 Fed. 128) | 276, 277 | v. Wisconsin etc. R. Co. (117 Fed. 782) | 1473 | |
| v. National Land etc. Co. (72 Fed. 576) | 1487, 1491, 1494, 1611 | Stickney v. Wilt (23 Wall. 150) | 80 | |
| Stead v. Course (4 Cranch 408) | 580, 540, 541, 548 | Stillman v. Combe (197 U. S. 436) | 756 | |
| Steam Cutter Co. v. Jones (13 Fed. 567) | 72 | v. Hart (61 C. C. A. 309, 126 Fed. 359) | 1161 | |
| Steamship Co. v. Tugman (106 U. S. 118) | 196 | Stillwell-Bierce etc. Co. v. Williams-town Oil etc. Co. (80 Fed. 68) | 209 | |
| Steam Stone Cutter Co. v. Jones (13 Fed. 567) | 40, 62, 417 | Stimson Land Co. v. Rawson (62 Fed. 426) | 469 | |
| v. Sears (9 Fed. 8) | 62, 417 | Stimpson v. Brooks (3 Blatchf. 466) | 1084 | |
| v. Sheldons (81 Fed. 875) | 1148 | Stinson v. Hildrup (8 Bliss. 376, Fed. Cas. No. 18,458) | 189, 358 | |
| Stearns v. Page (7 How. 819, 1 Story 804, Fed. Cas. No. 18,339) | 111, 119, 568, 587 | Stockard v. Pinkard (6 Humph. 121) | 687 | |
| Stebbins v. St. Anne (110 U. S. 386) | 271 | Stockton v. Ford (11 How. 282) | 444 | |
| Stegner v. Blake (86 Fed. 188) | 1048, 1054 | Stoddert v. Waters (Fed. Cas. No. 18,472) | 1402 | |
| Steigleider v. McQuesten (198 U. S. 141, 25 Sup. Ct. 616) | 178 | Stokes v. Farnsworth (99 Fed. 836) | 190, 465, 489, 973, 698 | |
| | | Stone v. Bishop (4 Cliff. 593, Fed. Cas. No. 18,482) | 743, 748 | |
| | | v. Kentucky Bank (174 U. S. 799) | 46 | |
| | | v. Towne (91 U. S. 341) | 808 | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|----------------|--|-------------------------------|
| Stonemets Printers Co. v. Brown etc. | | Sunflower Oil Co. v. Wilson (142 U. S. 313)..... | 11, 1524 |
| Co. (46 Fed. 72)..... | 166 | | |
| v. Brown Folding etc. Co. (46 Fed. 851)..... | 628 | Sunset Tel. etc. Co. v. Eureka (122 Fed. 960)..... | 621, 1126 |
| Story, Esq. v. (12 Pet. 339)..... | 999 | Surget v. Byers (Hempt. 715, Fed. Cas. No. 13,629)..... | 160, 961, 1154 |
| v. Livingston (13 Pet. 359 .18, 65, 73, 308, 316, 847, 869, 872, 882, 894, 897, 898, 902, 1191 | | Susquehanna etc. R. Co. v. Blatchford (11 Wall. 172)..... | 189, 234, 334 |
| Stout v. Rigney (46 C. C. A. 459, 107 Fed. 546)..... | 287 | Sutherland v. Lake Superior Ship Canal etc. Co. (Fed. Cas. No. 13,648) | 620, 1649 |
| Strader v. Graham (18 How. 602)..... | 1205 | Sutton v. Doggett (3 Beav. 9)..... | 1218 |
| Strang v. Richmond etc. R. Co. (41 C. C. A. 474, 101 Fed. 511)..... | 33, 53, | Suydam v. Beale (4 McLean 12) | 944 |
| Strange v. Collins (2 Ves. & B. 163)..... | 588 | c. Truesdale (6 McLean 459, Fed. Cas. No. 13,656)..... | 694 |
| Strasburger v. Beecher (44 Fed. 209)..... | 207 | Swafford v. Templeton (185 U. S. 487)..... | 211 |
| Strathmore v. Bowes (2 Bro. Ch. 88, 2 Dick. 678)..... | 1362 | Swan, In re (150 U. S. 637, 14 Sup. Ct. 225)..... | 1501 |
| Stratton v. Dewey (79 Fed. 32, 24 C. C. A. 435)..... | 558 | v. Wright (3 Woods 587, Fed. Cas. No. 13,670)..... | 1280, 1281 |
| v. Jarvis (8 Pet. 4)..... | 215 | Swan Land etc. Co. v. Frank (148 U. S. 603)..... | 43, 324, 333, 334, 816 |
| Strawberry Hill v. Chicago etc. R. Co. (41 Fed. 568)..... | 580 | Swann v. Clark (110 U. S. 590, 4 Sup. Ct. 235)..... | 1599, 1600 |
| Strawbridge v. Curtiss (8 Cranch 267)..... | 186, | Swatzel v. Arnold (Woolw. 383, Fed. Cas. No. 13,682)..... | 662 |
| Street v. Steinam (88 Fed. 548)..... | 1014 | Sweeney v. Hanley (126 Fed. 97)..... | 1400 |
| Street v. Maryland Cent. R. Co. (58 Fed. 47)..... | 1611 | Swett v. Stark (31 Fed. 868)..... | 1629, 1632 |
| Strettell v. Ballou (9 Fed. 256)..... | 44 | Swift v. Eckford (6 Paige 22)..... | 560 |
| Stryker v. Grand County (28 C. C. A. 286, 77 Fed. 567)..... | 264 | v. Kortrecht (112 Fed. 709, 50 C. C. A. 429)..... | 1414 |
| Stuart v. Boulware (133 U. S. 81) 1567, 1603, 1606 | | v. Smith (102 U. S. 442)..... | 1653 |
| v. Easton (15 Sup. Ct. 268, 156 U. S. 46)..... | 204 | Swing v. White River Lumber Co. (91 Wis. 517, 65 N. W. 174)..... | 1539 |
| v. Easton (18 Sup. Ct. 650, 170 U. S. 383)..... | 221 | Swope v. Villard (61 Fed. 417)..... | 1549 |
| v. Gay (127 U. S. 518, 8 Sup. Ct. 1279)..... | 1651 | T. | |
| v. Hayden (18 C. C. A. 618, 72 Fed. 402 affirmed 189 U. S. 1) | 628, 641 | Tabor v. Indianapolis Journal etc. Co. (66 Fed. 423)..... | 133, 1055 |
| v. St. Paul (68 Fed. 644)..... | 934 | Taintor v. Franklin Nat. Bank (107 Fed. 825)..... | 876, 878, 910, 911 |
| Such v. New York State Bank (127 Fed. 450)..... | 50 | Talbot v. Marshfield (L. R. 1 Eq. 6) | 1133 |
| Sullivan v. Andoe (6 Fed. 641)..... | 304 | v. Rutledge, cited in Blount v. Burrow (4 Bro. Ch. 74, 75) | 980 |
| v. Cartier (77 C. C. A. 448, 147 Fed. 222)..... | 1414, 1415 | Tallman v. Baltimore etc. R. Co. (45 Fed. 156) | 877, 402 |
| v. Colby (71 Fed. 460, 18 C. C. A. 193) | 1500 | Tampa Waterworks Co. v. Tampa (124 Fed. 932)..... | 1386, 1384 |
| v. Fulton Steamboat Co. (6 Wheat. 450) | 187 | Tappan v. Beardley (10 Wall. 427) | 1099 |
| v. Portland etc. R. Co. (94 U. S. 806) | 28, 505, 568 | Tappan v. Smith (5 Biss. 78)..... | 714, 715 |
| v. Redfield (1 Paine 441)..... | 1358 | Tatum v. Ray (69 Fed. 682)..... | 1642 |
| v. Redfield (Fed. Cas. No. 13,597) | 114 | Taylor v. Merchants' F. Ins. Co. (9 How. 390) | 11, 12, 141 |
| v. Sheehan (8 Fed. 247)..... | 1556 | Taylor v. Benham (5 How. 277)..... | 100, 118 |
| Sullivan Timber Co. v. Mobile (110 Fed. 186)..... | 267 | | |

TABLE OF CASES.

1893

[References are to pages.]

| | | | |
|--|-------------------------|---|---------------------------|
| Taylor v. Carryl (20 How. 583).... | | Terrell v. Allison (21 Wall. 289).... | |
| 1466, 1467, 1545 | | 1304, 1307 | |
| v. Charter Oak L. Ins. Co. (17 Fed. 566)..... | 1266 | Terry, <i>Ez p.</i> (128 U. S. 289)..... | |
| v. Clark (89 Fed. 7)..... | 20, 40 | 1426, 1434, 1446 | |
| v. Cook (1 Younge Exch. 201) 1211 | | Terry v. Cape Fear Bank (20 Fed. 777)..... | 841 |
| v. Decatur etc. Co. (112 Fed. 499)..... | 1459 | v. Commercial Bank (92 U. S. 454)..... | 1230, 1236, 1272 |
| v. Dodd (5 Ind. 246)..... | 699 | v. Davy (107 Fed. 50, 46 C. C. A. 141)..... | 194, 541 |
| v. Life Asso. of America (13 Fed. 494)..... | 1204 | v. McLaren (108 U. S. 442)..... | 682 |
| v. Holmes (14 Fed. 498, <i>affirmed</i> 8 Sup. Ct. 1192, 127 U. S. 489)..... | 102, 287, 289, 319, 573 | v. Robbins (122 Fed. 725)..... | 878, 1411, 1416 |
| v. Life Assoc. of America (3 Fed. 465)..... | 1491, 1559 | Tesla Electric Co. v. Scott (101 Fed. 524)..... | 1186, 1191 |
| v. Longworth (14 Pet. 172)..... | 408 | Texas v. Hardenberg (10 Wall. 68)..... | 138 |
| v. Luther (2 Sumn. 228, Fed. Cas. No. 13,796)..... | 443, 588, 958 | Texas etc. R. Co. v. Bloom (164 U. S. 636, 17 Sup. Ct. 216, 9 C. C. A. 300, 60 Fed. 979)..... | 1619 |
| v. Philadelphia etc. R. Co. (7 Fed. 381)..... | 1487 | v. Coutourie (68 C. C. A. 177, 135 Fed. 465)..... | 1096 |
| v. Popham (15 Ves. Jr. 72)..... | 1210 | v. Cox (145 U. S. 598, 12 Sup. Ct. 905)..... | 232, 408, 409, 1545, 1548 |
| v. Robertson (27 Fed. 537)..... | 879, 904 | v. Humble (97 Fed. 887, 38 C. C. A. 502)..... | 289 |
| v. Bundell (1 Phill. 222)..... | 1133 | v. Johnson (151 U. S. 81)..... | 1550, 1619 |
| v. Southern Pac. R. Co. (122 Fed. 147)..... | 1308, 1376 | v. Kuteman (54 Fed. 547, 4 C. C. A. 503)..... | 208, 1404 |
| Taylor Mfg. Co. v. Hatcher Mfg. Co. (3 L.R.A. 587, 39 Fed. 440)..... | 900 | v. Rogers (57 Fed. 878, 6 C. C. A. 408)..... | 191 |
| Teasdale v. Rambler (Fed. Cas. No. 18,815)..... | 528 | v. Rust (5 McCrary 848)..... | 1399, 1400, 1401 |
| Teese v. Phelps (Fed. Cas. No. 18,818)..... | 192 | v. Saunders (14 Sup. Ct. 257, 151 U. S. 105)..... | 408 |
| v. Phelps (Fed. Cas. No. 18,819)..... | 528 | v. Wilder (35 C. C. A. 105, 92 Fed. 953)..... | 1055, 1056 |
| Tefft v. Stern (21 C. C. A. 73, 74 Fed. 755)..... | 1210 | Thames etc. Ins. Co. v. Continental Ins. Co. (37 Fed. 286)..... | 694 |
| Tegarden v. Le Marchel (129 Fed. 487)..... | 14 | Thayer v. Life Assoc. of America (112 U. S. 717)..... | 335 |
| Teller v. U. S. (118 Fed. 468, 51 C. C. A. 297)..... | 1354 | v. Wales (5 Fisher Pat. Cas. 448, Fed. Cas. No. 13,872)..... | 376, 528 |
| Temple v. Glasgow (80 Fed. 441, 25 C. C. A. 540)..... | 1497 | Third Street etc. R. Co. v. Lewis (173 U. S. 460)..... | 182 |
| Tennent-Stribling Shoe Co. v. Roper (94 Fed. 739, 36 C. C. A. 455)..... | 213 | Thomas, <i>In re</i> (35 Fed. 387)..... | 862, 1054 |
| Tennessee v. Condon (189 U. S. 64) 1170 | | <i>In re</i> (35 Fed. 822)..... | 1098 |
| v. Sneed (96 U. S. 75)..... | 297 | Thomas v. Brockenbrough (10 Wheat. 146)..... | 1256, 1257, 1267, 1276 |
| v. Union etc. Bank (152 U. S. 454)..... | 180, 182, 185, 1206 | v. Cincinnati etc. R. Co. (62 Fed. 17)..... | 1514 |
| Tennessee etc. R. Co. v. Grayson (119 U. S. 240, 7 Sup. Ct. 190)..... | 353 | v. Cincinnati etc. R. Co. (62 Fed. 803)..... | 1501 |
| Tennis Bros. Co. v. Wetzel etc. R. Co. (140 Fed. 193)..... | 1529 | v. Cincinnati etc. R. Co. (77 Fed. 667)..... | 1528, 1530 |
| Terre Haute etc. R. Co. v. Cox (102 Fed. 825, 42 C. C. A. 654)..... | 1508 | v. East Tennessee etc. R. Co. (60 Fed. 7)..... | 1516 |
| v. Harrison (96 Fed. 907, 37 C. C. A. 615)..... | 1656 | v. National Bank (106 Fed. 438, 45 C. C. A. 407)..... | 191 |
| v. Peoria etc. R. Co. (82 Fed. 943)..... | 1473 | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|--------------------------|--|---------------------|
| Thomas v. Ohio State University (195 U. S. 218)..... | 177 | Tighe v. Keystone Coal Co. (99 Fed. 184, 39 C. C. A. 447)..... | 1653 |
| v. Peoria etc. R. Co. (80 Fed. 808) | 828 | Tilford v. Atlantic Match Co. (134 Fed. 924) | 1494 |
| v. Western Car Co. (149 U. S. 95, 18 Sup. Ct. 824) | 828 | Tilghman v. Proctor (125 U. S. 136, 8 Sup. Ct. 894) | 914 |
| 1529, 1585 | | v. Tilghman (Baldw. 404, Fed. Cas. No. 10,045) | 980 |
| Thomas G. Plant Co. v. May Co. (44 C. C. A. 584, 105 Fed. 375),.... | 1396 | v. Werk (39 Fed. 680) | 1256 |
| Thomson v. Dean (7 Wall. 346) | 1161 | 1263, 1264, 1274 | |
| v. Wooster (114 U. S. 110) | | Tillinghast v. Chace (121 Fed. 485) 475, 476, 477 | |
| 75, 824, 825, 949, 950, 951, 952, 953, 954 | | Tilton v. Barrell (14 Fed. 609) | 290 |
| Thomson-Houston Electric Co. v. Jeff- rey Mfg. Co. (83 Fed. 614) | 1027, 1060 | v. Barrell (17 Fed. 59, 119 U. S. 637) | 1238 |
| Thompson v. Central Ohio B. Co. (6 Wall. 134) | 62 | v. Coffield (93 U. S. 163) | 666 |
| v. Cooper (2 Coll. Ch. Cas. 87) | 1218 | Timmons v. Elyton Land Co. (139 U. S. 378) | 191 |
| v. Lambe (7 Ves. Jr. 587) | 969 | Tinsley v. Anderson (171 U. S. 101, 18 Sup. Ct. 805) | 1498, 1501 |
| v. McReynolds (29 Fed. 657) | | v. Hoot (53 Fed. 682, 3 C. C. A. 612) | 191, 1206 |
| v. Maxwell (95 U. S. 291) | 681, 1258, 1261, 1265 | Tipterman v. National Bank (100 U. S. 6) | 209 |
| v. Maxwell etc. R. Co. (18 Sup. Ct. 121, 168 U. S. 451) | 1173 | Titterton v. Osborne (1 Dick. 350) .. | 360 |
| v. McPhee (4 Heish. 379) | 348 | Tobey v. Leonard (2 Wall. 428) | 974 |
| v. Nelson (18 C. C. A. 137, 71 Fed. 839) | 1396 | Tobin v. Walkinshaw (McAll. 28, Fed. Cas. No. 14,068) | 505 |
| v. Phenix Ins. Co. (186 U. S. 287) | 1516, 1521 | Toland v. Sprague (12 Pet. 300) | |
| v. Railroad Companies (6 Wall. 134) | 5, 24, 53 | 372, 408 | |
| v. Schenectady R. Co. (119 Fed. 634) | 720, 1259 | Toledo etc. R. Co. v. Continental Trust Co. (86 C. C. A. 155, 95 Fed. 497) | 793, 795 |
| v. Scott (4 Dill. 508, Fed. Cas. No. 18,975) | 1503, 1545, 1546 | c. Pennsylvania Co. (19 L.R.A. 387, 54 Fed. 730) | 1355, |
| v. Smith (2 Bond 320, Fed. Cas. No. 18,976) | 847, 858, 874, 905 | 1380, 1381, 1389, 1391, 1427, 1443 | |
| v. Smith (1 Dill. 458, Fed. Cas. No. 18,977) | 1306, 1307, 1308 | Toler v. East Tennessee etc. R. Co. (67 Fed. 168) | 815, 636, 822, 828, |
| v. Southern R. Co. (116 Fed. 890) | 213 | 824, 826, 827, 1630, 1637, 1645 | |
| Thorne v. The Victoria (Fed. Cas. No. 18,988) | 1190 | Tompkins v. Craig (93 Fed. 885) .. | 268 |
| Thorneloe v. Hill (1894, 1 Ch. 569) | 1208 | Tonkin v. Lethbridge (G. Coop. 43) .. | 706 |
| Thornton N. Motley Co. v. Detroit etc. Co. (130 Fed. 396) | 273 | Tonopah etc. Co. v. Douglass (123 Fed. 936) | 65, 190 |
| Thorpe v. Sampson (84 Fed. 68) | 1467 | Total v. Spicer (4 Sim. 510) | 1218 |
| Thriling v. Edgar (2 Sim. & St. 274) | 601 | Topliff v. Topliff (145 U. S. 173) | 897 |
| Thurber v. Cecil Nat. Bank (52 Fed. 513, reversed 59 Fed. 913, 8 C. C. A. 365) | 1069, 1119 | Torrence v. Shedd (144 U. S. 527, 12 Sup. Ct. 736) | 1206 |
| v. Miller (14 C. C. A. 432, 67 Fed. 871) | 1207 | Torrent v. Hamilton (95 Mich. 163) .. | 560 |
| Thurston v. Big Stone etc. Co. (86 Fed. 484) | 684, 635, 637 | Tortat v. Hardin Min. etc. Co. (111 Fed. 426) | 402 |
| Tiernan v. Woodruff (5 McLean 135) | 666 | Towle v. American Bldg. etc. Soc. (60 Fed. 181) | 221 |
| Tift, In re (11 Fed. 463) | 1450 | Townsend v. Jamison (7 How. 717) .. | 579 |
| | | v. Little (108 U. S. 504) | 52 |
| | | v. Vanderwerker (160 U. S. 171, 16 Sup. Ct. 258) | 148 |
| | | 34, 180, 308 | |
| | | Traders Nat. Bank v. Campbell (14 Wall. 87) | |
| | | Treadwell v. Cleaveland (3 McLean 283, Fed. Cas. No. 14,155) .. | 442 |
| | | v. Lennig (50 Fed. 872) | 972 |

TABLE OF CASES.

1895

[References are to pages.]

| | U. |
|--|--|
| Trocotchek v. Austin (Fed. Cas. No. 14,184) | 329 |
| Tremlett v. Adams (18 How. 298) | 1201 |
| Tremore Patent, The (28 Wall. 527) | 679 |
| Trice v. Comstock (115 Fed. 765) | 26 |
| Troup v. Sherwood (8 Johns. Ch. 562) | 1011 |
| Troy Iron etc. Factory v. Corning (6 Blatchf. 328) | 875, 896 |
| v. Corning (10 Blatchf. 228) | 1200 |
| Truly v. Wanzer (5 How. 142) | 1366 |
| Trustees v. Greenough (105 U. S. 527) | 1212, 1215, 1216, 1218, 1324, 1567, 1606 |
| Tucker, <i>In re</i> (131 Fed. 647, 148 Fed. 828) | 3, 1245 |
| Tucker v. Bean (85 Me. 352) | 947 |
| v. Carpenter (Hempst. 440) | 1366, 1399, 1402 |
| v. Curtin (78 C. C. A. 857, 148 Fed. 929) | 59 |
| Tufts v. Tufts (Fed. Cas. No. 14,222) | 1243 |
| Tug River Coal etc. Co. v. Brigel (31 U. S. App. 666, 14 C. C. A. 577, 67 Fed. 625, 17 C. A. 367, 70 Fed. 647) | 191, 193, 349, 393, 1191, 1206 |
| v. Brigel (80 C. C. A. 415, 86 Fed. 818) | 179 |
| Tullock v. Mulvane (184 U. S. 497, 22 Sup. Ct. 372) | 1413, 1414 |
| Turner v. Envile (4 Dall. 7) | 188 |
| v. Farmers' L. & T. Co. (106 U. S. 559) | 58, 1281 |
| v. Indianapolis etc. R. Co. (8 Biss. 318) | 1575 |
| v. Indianapolis etc. R. Co. (8 Biss. 380, Fed. Cas. No. 14-259) | 1231, 1650, 1651 |
| v. North America Bank (4 Dall. 8) | 176, 199, 200 |
| Tuttle v. Clafin (22 C. C. A. 138, 76 Fed. 227) | 851 |
| Twin City Power Co. v. Barrett (61 C. C. A. 288, 126 Fed. 302) | 1615, 1622 |
| Twin-Lick Oil Co. v. Marbury (91 U. S. 587) | 111 |
| Tyler, <i>In re</i> (149 U. S. 164) | 1496, 1504, 1545, 1549 |
| Tyler v. Galloway (13 Fed. 477) | 665 |
| v. Hand (7 How. 581) | 567, 561, 565 |
| v. Savage (143 U. S. 79, 12 Sup. Ct. 340) | 28, 138 |
| Tyler Min. Co. v. Last Chance Min. Co. (80 Fed. 15, 32 C. C. A. 498) | 1410 |
| v. Sweeney (24 C. C. A. 578, 79 Fed. 277) | 1222 |
| Tysen v. Wabash R. Co. (Fed. Cas. No. 14,815) | 1460 |
| Udall v. Steamship Ohio (17 How. 18) | 206 |
| Uhle v. Burnham (44 Fed. 728) | 1023 |
| Uhlmann v. Arnhold etc. Co. (41 Fed. 869) | 446, 476, 477, 972 |
| Ulman v. Clark (75 Fed. 868) | 1458, 1459 |
| v. Iaeger (67 Fed. 980) | 120, 250, 559, 569 |
| v. Iaeger (155 Fed. 1016) | 637, 638 |
| v. Ritter (72 Fed. 1000) | 1387, 1445, 1452 |
| Ulrich, <i>In re</i> (Fed. Cas. No. 14,827) | 778 |
| Underground R. Co. v. New York (198 U. S. 416, 116 Fed. 952) | 181 |
| Underwood v. Patrick (94 Fed. 468, 36 C. C. A. 380) | 1861 |
| Ung Lung Chung v. Holmes (98 Fed. 323) | 209 |
| Union etc. Co. v. Phila. etc. R. Co. (68 Fed. 913) | 258 |
| Union Bank v. Geary (5 Pet. 99) | 475, 974, 976 |
| v. Kansas City Bank (136 U. S. 223) | 1496, 1516 |
| v. Riggs (Fed. Cas. No. 14,361) | 797 |
| v. Stafford (12 How. 327) | 1639 |
| Union Cement Co. v. Noble (15 Fed. 502) | 502 |
| Union Cent. Ins. Co. v. Phillips (102 Fed. 19, 41 C. C. A. 263) | 12 |
| Union Mill etc. Co. v. Dangberg (1 C. C. A.) 81 Fed. 78) | 257, 326, 328, 348 |
| v. Warren (82 Fed. 519) | 65 |
| Union Mut. L. Ins. Co. v. Chicago University (6 Fed. 443) | 1487 |
| v. Hanford (143 U. S. 187) | 36 |
| v. Kellogg (Fed. Cas. No. 14,878) | 1828, 1836, 1480 |
| v. Union Mills Plaster Co. (37 Fed. 286, 3 L.R.A. 90) | 1459, 1466, 1632 |
| Union Pac. R. Co. v. Cheyenne (113 U. S. 516) | 45 |
| v. Harmon (4 C. C. A. 165, 54 Fed. 29) | 1153 |
| v. Meier (28 Fed. 9) | 163, 562 |
| Union Stock-Yards Nat. Bank v. Moore (25 C. C. A. 150, 79 Fed. 705) | 313 |
| Union Sugar Refinery v. Mathieson (8 Clif. 146) | 857, 861, 873, 880, 882, 895 |
| Union Switch etc. Co. v. Philadelphia etc. R. Co. (69 Fed. 888) | 532 |
| v. Philadelphia etc. R. Co. (75 Fed. 1004) | 1371 |

[References are to pages.]

| | | |
|---|------|--|
| Union Trust Co. v. Atchison etc. Co. (87 Fed. 530)..... | 1556 | U. S. v. Barker (2 Wheat. 395)..... 1192 v. Beebe (127 U. S. 338)..... 85 v. Beebe (180 U. S. 354, 21 Sup. Ct. 371) 121 |
| v. Chicago etc. R. Co. (7 Fed. 513) 1593, 1594 | | v. Bell Telephone Co. (128 U. S. 315, 9 Sup. Ct. 90)..... 85, 258 |
| v. Illinois Midland R. Co. (117 U. S. 484, 6 Sup. Ct. 909) 1520, 1584, 1597 | | v. Berry (24 Fed. 783)..... 1425 |
| v. Inland Nav. etc. Co. (130 U. S. 565)..... 825 | | v. Bitter Root Co. (200 U. S. 451) 29, 114 |
| v. Morrison (125 U. S. 591)..... 1585 | | v. Boyd (118 Fed. 89)..... 273 |
| v. Rockford etc. R. Co. (6 Biss. 197, Fed. Cas. No. 14,401) 365, 1467 | | v. Brig Glamorgan (2 Curt. C. C. 286)..... 1232 |
| v. St. Louis etc. R. Co. (5 Dill. 1, Fed. Cas. No. 14,403)..... 1647 | | v. Brig Malek Adhel (2 How. 210) 1222 |
| v. Walker (107 U. S. 596, 2 Sup. Ct. 299) 1655 | | v. Burr (Fed. Cas. No. 14,692d) 1106 |
| United Cigarette etc. Co. v. Wright (132 Fed. 195).... 245, 588, 597, 639 | | v. California etc. Land Co. (148 U. S. 81, 18 Sup. Ct. 458).. 501, 516, 536, 541 |
| United Electric Securities Co. v. Lou- isiana Electric Light Co. (68 Fed. 673)..... 832 | | v. California etc. Land Co. (192 U. S. 855)..... 647, 648 |
| v. Louisiana Electric Light Co. (71 Fed. 615)..... 1523 | | v. Chicago etc. R. Co. (54 C. C. A. 545, 116 Fed. 969).... 120 |
| United Trust Co. v. New Mexico (183 U. S. 542)..... 1532 | | v. Carlisle (Fed. Cas. No. 14,724) 1407 |
| Universal Sav. etc. Co. v. Stoneburner (113 Fed. 251, 51 C. C. A. 208) 1853, 1411, 1459, 1475 | | v. Castro (5 Sawy. 625, Fed. Cas. No. 14,754)..... 1229 |
| Universal Talking Mach. Co. v. Keen (136 Fed. 456)..... 1440 | | v. Coal Dealers Assoc. (85 Fed. 252) 348 |
| Upham v. Brooks (Fed. Cas. No. 16,796) 315 | | v. Compagnie Francaise (77 Fed. 495) 1877 |
| U. S. v. Agler (62 Fed. 824) .. 154, 1354, 1432, 1438, 1437, 1443 | | v. Coudert (78 Fed. 505, 19 C. C. A. 543) 800 |
| v. American Bell Telephone Co. (29 Fed. 17) 371, 375, 378, 411 | | v. Cowing (4 Cranch C. C. 613, Fed. Cas. No. 14,890)..... 433 |
| v. American Bell Telephone Co. (30 Fed. 523)..... 588 | | v. Curry (6 How. 106)..... 400 |
| v. American Bell Telephone Co. (39 Fed. 230)..... 1021 | | v. Curtner (26 Fed. 296)..... 262 |
| v. American Bell Telephone Co. (39 Fed. 716).... 486, 652, 655 | | v. Dalles Military Road Co. (140 U. S. 599)..... 531, 533, 536 |
| v. American Bell Telephone Co. (159 U. S. 548)..... 185 | | v. Dalles Military Road Co. (41 Fed. 493) 536 |
| v. American Lumber Co. (80 Fed. 309)..... 894 | | v. Dastervignes (118 Fed. 199) 813 |
| v. Ames (99 U. S. 85, affirming Fed. Cas. No. 14,440)..... 32 | | v. Debs (64 Fed. 724).... 1426, 1440, 1442, 1443, 1446 |
| v. Ames (99 U. S. 45)..... 561 | | v. Dickelman (92 U. S. 524) .. 299 |
| v. Anonymous (21 Fed. 761) 75, 1029, 1438, 1442 | | v. Dodge (2 Gall. 313)..... 1442 |
| v. Armejo (131 U. S. lxxii, Appx.) 407 | | v. Doughty (7 Blatchf. 424) ... 85, 86 |
| v. Atchison etc. R. Co. (16 Fed. 853) 1425, 1448 | | v. Duane (Wall. C. C. 102).... 1424 |
| v. Atchison etc. R. Co. (142 Fed. 176)..... 1427, 1446, 1447 | | v. Eisenbeis (50 C. C. A. 179, 112 Fed. 197)..... 1469 |
| v. Atherton (102 U. S. 372).... 109, 531, 654 | | v. Elliott (64 Fed. 27)..... 1389 |
| v. Babcock (3 Dill. 566) .. 1111, 1112 | | v. Ferguson (54 Fed. 28) 452, 496, 961 |
| | | v. Fifty Boxes (92 Fed. 601) .. 1087, 1045, 1091 |
| | | v. Finnell (185 U. S. 236, 22 Sup. Ct. 633)..... 771 |
| | | v. Flournoy etc. Co. (69 Fed. 886) 262 |
| | | v. Gear (3 How. 120)..... 1368 |

TABLE OF CASES.

1897

[References are to pages.]

| | | | | |
|--|---------------------------|--|---------------------------------|-----|
| U. S. v. Gillespie (6 Fed. 803)... | 514, | U. S. v. Pine River Logging etc. Co. (78 Fed. 319, 24 C. C. A. 101) | 567 | 817 |
| v. Green (85 Fed. 859)... | 1425, 1448 | v. Pings (4 Fed. 714)... | 1045, 1087 | |
| v. Gugliard (79 Fed. 21)... | 247, 276 | v. Pittsburgh etc. R. Co. (26 Fed. 118) | 84, 86 | |
| v. Gunning (28 Fed. 668)... | 1247 | v. Pratt etc. Co. (18 Fed. 708) 99, 205, 288, 348 | | |
| v. Haggerty (116 Fed. 510)... | 1443 | v. Ringgold (8 Pet. 150)... | 1186, 1189, 1192 | |
| v. Hendy (6 C. C. A. 10, 54 Fed. 447) | 326 | v. Sampervac (Hempst. 118, Fed. Cas. No. 16,215a).... 927, 952, 1261, 1272, 1273 | | |
| v. Holmes (1 Wall. Jr. 1, Fed. Cas. No. 15,883)..... | 1424 | v. San Jacinto Tin Co. (125 U. S. 273)..... | 85 | |
| v. Hom Hing (48 Fed. 635)... | 1038 | v. Santa Fe (165 U. S. 714)... | 176 | |
| v. Hughes (11 How. 552).... | 84 | v. Shipp (203 U. S. 574).... | 1442 | |
| v. Hunter (15 Fed. 712)..... | 1111 | v. Southern Pac. R. Co. (40 Fed. 611)..... | 565 | |
| v. Hyde (145 Fed. 893)... | 165, 166 | v. Southern Pac. R. Co. (55 Fed. 566)..... | 1370 | |
| v. Ingate (48 Fed. 251)..... | 20 | v. Southern Pac. R. Co. (117 Fed. 544, 133 Fed. 651, 66 C. C. A. 581)..... | 52 | |
| v. Jacobi (1 Flipp. 108).... | 1425 | v. Stevenson (1 Abb. (U. S.) 495, Fed. Cas. No. 16,395) | 76 | |
| v. Jeillico Mountain etc. Co. (43 Fed. 898)..... | 1352, 1377 | v. Stone (2 Wall. 525)..... | 85 | |
| v. Judges of U. S. Court of Ap- peals (85 Fed. 177, 29 C. C. A. 78)..... | 742 | v. The Schooner Little Charles (1 Brock. 380, Fed. Cas. No. 15,618) | 770 | |
| v. Keokuk (6 Wall. 514).... | 1446 | v. Thompson (98 U. S. 489)... | 297 | |
| v. Knight (1 Black 489).... | 1284 | v. Throckmorton (98 U. S. 61) 85, 1275 | | |
| v. Knox (102 U. S. 422).... | 268 | v. Tilden (10 Ben. 566, Fed. Cas. No. 16,522)..... | 1078, 1103, 1105, 1107, 1110 | |
| v. Lee (106 U. S. 205).... | 297 | v. Trans-Missouri etc. Assoc. (24 L.R.A. 78, 7 C. C. A. 15, 58 Fed. 58)..... | 930 | |
| v. Loughrey (43 Fed. 449).... | 283 | v. Union Pac. R. Co. (98 U. S. 569) | 86, 411 | |
| v. Louisville etc. Canal Co. (4 Dill. 601, Fed. Cas. No. 15,638) | 1347 | v. Wayne (Wall. C. C. 184, Fed. Cas. No. 16,654)..... | 1438 | |
| v. Luce (141 Fed. 385)... | 1418, 1419 | v. Weber (114 Fed. 950)... | 1348, 1448 | |
| v. McAvoy (4 Blatchf. 418)... | 86 | v. Williams (67 Fed. 384, 14 C. C. A. 440)..... | 1228 | |
| v. McLaughlin (24 Fed. 823)... | 134, 476, 493, 1119, 1124 | v. Wilson (118 U. S. 86, 6 Sup. Ct. 991)..... | 39, 40, 41, 62 | |
| v. Mann (2 Brock. 9)..... | 1298 | v. Winona etc. R. Co. (15 C. C. A. 96, 67 Fed. 948)..... | 323 | |
| v. Mann (95 U. S. 584).... | 561 | v. Winter (13 Blatchf. 276)... | 99 | |
| v. Marshal Silver Min. Co. (129 U. S. 579)..... | 85 | v. Workingmen's Amalgamated Council (54 Fed. 994, 26 L.R.A. 158)..... | 972, 1481 | |
| v. Memphis etc. R. Co. (6 Fed. 237) | 1448, 1449 | U. S. Bank v. Beverly (1 How. 184) | 435 | |
| v. Minor (114 U. S. 233).... | 85 | v. Deveaux (5 Cranch 61).... | 195 | |
| v. Murphy (44 Fed. 39).... | 1501 | v. Halstead (10 Wheat. 51).... | 69 | |
| v. Murphy (82 Fed. 898).... | 798 | v. Moss (6 How. 31) | 1232 | |
| v. Northern Pac. R. Co. (37 C. C. A. 290, 95 Fed. 864, 177 U. S. 435)..... | 26 | v. Ritchie (8 Pet. 128)... | 299, 301, 374 | |
| v. Northern Pac. R. Co. (67 C. C. A. 269, 134 Fed. 715)... | 324 | | | |
| v. Northwestern Express Co. (164 U. S. 689)..... | 198 | | | |
| v. O'Keefe (11 Wall. 182).... | 297 | | | |
| v. Old Settlers (148 U. S. 427)... | 388 | | | |
| v. Parrott (1 McAll. 271, Fed. Cas. No. 15,998)... | 1362, 1384, 1406, 1407 | | | |
| v. Parrott (McAll. 447, Fed. Cas. No. 15,999)... | 775, 1037, 1043 | | | |
| v. Peralta (99 Fed. 618)... | 501, 557, 559 | | | |
| v. Phillips (107 Fed. 824, 46 C. C. A. 660) | 833, 837 | | | |

TABLE OF CASES.

[References are to pages.]

| | | | |
|--|----------------------------|--|--------------------|
| U. S. Bank v. Roberts (Fed. Cas. No. 934) | 290, 398 | Vannmetter v. Borden (25 N. J. Eq. 414) | 1308 |
| v. White (8 Pet. 262) | 70, 73, 949, 1259, 1263 | Vannersea v. Leverett (81 Fed. 376) | 641 |
| U. S. Bung Mfg. Co. v. Armstrong (34 Fed. 94) | 1539 | Van Norde v. Merton (99 U. S. 278) | 16, 49 |
| U. S. Express Co. v. Kountse (8 Wall. 342) | 197 | Van Reimdyk v. Karp (Fed. Can. No. 16,878) | 971 |
| v. Poe (61 Fed. 475) | 208 | Van Siclen v. Bartol (96 Fed. 798) | 1203 |
| U. S. Gramophone Co. v. Seaman (113 Fed. 745, 51 C. C. A. 419) | 1397 | Vanstrophor v. Maryland (2 Dell. 401) | 1044 |
| U. S. Life Ins. Co. v. Cable (39 C. C. A. 204, 98 Fed. 761) | 50 | Vattier v. Hinde (7 Pet. 252) | 326 |
| v. Ross (43 C. C. A. 601, 102 Fed. 722) | 1056 | 330, 334, 479, 481, 521, 738, 1099 | |
| U. S. Mineral Wool Co. v. Manville Covering Co. (101 Fed. 145) | 239 | Veanie v. Williams (3 Story 54, Fed. Cas. No. 16,900) | 707 |
| U. S. Mining Co. v. Lawson (134 Fed. 769, 67 C. C. A. 587) | 18 | v. Williams (3 Story 611) | 1211 |
| U. S. National Bank v. McNair (56 Fed. 323) | 200 | Velle v. Blodgett (49 Vt. 270) | 984 |
| U. S. Trust Co. v. Mercantile Trust Co. (88 Fed. 140, 31 C. C. A. 427) | 901, 919, 1528, 1574 | Vermont Farm Mach. Co. v. Converse (10 Fed. 825) | 1243 |
| v. New Mexico (183 U. S. 535, 28 Sup. Ct. 179) | 836, 1531 | Very v. Watkins (28 How. 469) | 1506 |
| v. Omaha etc. R. Co. (68 Fed. 787) | 911, 1515 | Vetterlein v. Barker (45 Fed. 741) | 1264 |
| v. Wabash etc. R. Co. (150 U. S. 287) | 1528 | Vicksburg v. Vicksburg Waterworks Co. (202 U. S. 458) | 904, 1380 |
| Utah Constr. Co. v. Montana R. Co. (145 Fed. 981) | 1131, 1135, 1136 | Vicksburg Waterworks Co. v. Vicksburg (185 U. S. 68) | 180 |
| Utah-Nevada Co. v. De Lamar (145 Fed. 505, 75 C. C. A. 1) | 672 | Victor G. Bleeds Co. v. Carter (148 Fed. 127) | 448, 449, 476 |
| | | Victor Sewing-Mach. Co. v. Mingus (Fed. Cas. No. 16,936) | 207 |
| | | Victor Talking Mach. Co. v. American Graphophone Co. (118 Fed. 50) | 330 |
| V. . | | Vigci v. Hopp (104 U. S. 441) | 974 |
| Vacuum Oil Co. v. Eagle Oil Co. (122 Fed. 105) | 519, 528 | Vigore v. Audley (9 Sims. 72) | 727 |
| v. Eagle Oil Co. (154 Fed. 867) | 508, 541, 549 | Virginia v. West Virginia (306 U. S. 290) | 580 |
| Valette v. Whitewater Canal Co. (Fed. Cas. No. 16,830) | 337 | Virginia etc. Coal Co. v. Central R. etc. Co. (170 U. S. 353) | 1575, 1585 |
| Van Antwerp v. Hulburd (7 Blatchf. 426, Fed. Cas. No. 16,826) | 528 | Virginia etc. Steel etc. Co. v. Bristol Land Co. (88 Fed. 134) | 1504 |
| v. Hulburd (8 Blatchf. 285) | 1482 | Virginia-Carolina etc. Co. v. Home Ins. Co. (51 C. C. A. 21, 113 Fed. 1) | 149, 252, 266, 747 |
| Vance v. Royal Clay Mfg. Co. (82 Fed. 261) | 1505 | Vogel v. Warsing (77 C. C. A. 192, 146 Fed. 949) | 1396 |
| v. W. A. Vandercook Co. (170 U. S. 468, 18 Sup. Ct. 645) | 209 | Volk v. B. F. Sturtevant Co. (39 C. C. A. 648, 99 Fed. 529) | 364 |
| Vancouver v. Bliss (11 Ves. Jr. 458) | 1194 | Von Auw v. Chicago Toy etc. Co. (69 Fed. 448, 70 Fed. 939) | 276 |
| Vanderwick v. Summerl (1 Wash. C. C. 41) | 861 | Von Roy v. Blackman (3 Woods 98, Fed. Cas. No. 16,897) | 371, 376, 377 |
| Van Dolsen v. New York (17 Fed. 817) | 221 | Von Schroeder v. Brittan (98 Fed. 9) | 208 |
| Van Hook v. Pendleton (2 Blatchf. 85, Fed. Cas. No. 16,852) | 1026, 1068, 1098 | v. Brittan (98 Fed. 100) | 456, 457, 466 |
| Van Horn v. Kittitas Co. (112 Fed. 1) | 191 | Voorhees v. Bonestell (16 Wall. 18) | |
| | | 108, 109, 290, 974 | |
| | | Voorhees v. Blanton (96 Fed. 497) | 1311 |
| | | Vose v. Bronson (6 Wall. 459) | 1657 |
| | | v. International Imp. Fund (2 Woods 647, Fed. Cas. No. 17,008) | 1251, 1452 |

TABLE OF CASES.

1899

[References are to pages.]

| | | | |
|--|---------------------------|---|-------------|
| Voss v. Reed (1 Woods 647, Fed. Cas. No. 17,011) | 1436, 1458, 1460, 1478 | Wallace v. Arkansas Cent. R. Co. (118 Fed. 422) 55 C. C. A. 192) | 1366 |
| Voss v. Neineber (68 Fed. 947) | 190, 285 | v. Clark (Fed. Cas. No. 17,098) | 79 |
| Vroom v. Ditmas (5 Paige 528, I Barb. Ch. Pr. 841) | 1179 | v. Loomis (97 U. S. 146) | 1577, 1583 |
| | | v. Taylor (Fed. Cas. No. 17,108) | 674 |
| | | Walla Walla v. Walla Walla Water Co. (172 U. S. 1) | 35 |
| | | Wallen v. Williams (7 Cranch 602) | 1805 |
| | | Wallis v. Shelly (30 Fed. 747) | 1121 |
| | | Walsh v. Memphis etc. R. Co. (6 Fed. 797) | 319 |
| | | v. Rogers (13 How. 288) | 1051 |
| | | Walter v. Northeastern R. Co. (147 U. S. 373) | 216 |
| | | Walters v. Anglo-American Mortg. etc. Co. (50 Fed. 816) | 1614, 1615 |
| | | v. Farmers Bank (76 Va. 12) | 1658 |
| | | v. Western etc. R. Co. (69 Fed. 706) | 917 |
| | | Walton v. Coulson (Fed. Cas. No. 17,182) | 301 |
| | | v. Marietta Chair Co. (157 U. S. 347) | 99 |
| | | Wals v. Brookville Nat. Bank (Fed. Cas. No. 17,187) | 948 |
| | | Wann v. Coe (31 Fed. 369) | 849, 869 |
| | | Wanneker v. Hitchcock (38 Fed. 383) | 1459 |
| | | Ward v. Amory (1 Curt. C. C. 419, Fed. Cas. No. 17,146) | 280 |
| | | v. Arredondo (Fed. Cas. No. 17,148) | 308 |
| | | v. Blake Mfg. Co. (56 Fed. 437, 5 C. C. A. 588) | 197 |
| | | v. Chamberlain (2 Black 480) | 40, 69, 70 |
| | | v. Maryland (12 Wall. 168) | 1143 |
| | | v. Paducah etc. R. Co. (4 Fed. 862) | 858, 854 |
| | | v. Peck (114 Mass. 121) | 474 |
| | | v. San Diego Land etc. Co. (79 Fed. 684) | 319 |
| | | v. Seabry (4 Wash. C. C. 426, Fed. Cas. No. 17,161) | 385, 387 |
| | | v. Sebring (4 Wash. C. C. 472, Fed. Cas. No. 17,160) | 387, |
| | | 388, 641, 645 | |
| | | v. Sherman (102 U. S. 168, 24 Sup. Ct. 227) | 78, 79, 120 |
| | | v. Ward (79 C. C. A. 162, 149 Fed. 204) | 1246, 1286 |
| | | Warner v. Godfrey (186 U. S. 365) | 679 |
| | | Warren v. Burnham (32 Fed. 579) | 1196 |
| | | v. Van Brunt (19 Wall. 654) | 103 |
| | | Wart v. Wart (117 Fed. 768) | 21 |
| | | Wartman v. Wartman (Taney 370) | 1422 |
| | | Washburn v. Pulliman's Palace-Car Co. (76 Fed. 1005, 21 C. C. A. 598) | 742 |
| | | Washburn etc. Mfg. Co. v. Colwell Steel Barb Fence Co. (1 Fed. 225) | 1286 |
| | | 7 | |

[References are to pages.]

| | | | |
|---|-----------|---|------------|
| <i>Washington v. Northern Pac. R. Co.</i> | | <i>Webster v. Webster (1 Smale & G.</i> | |
| (75 Fed. 383)..... | 742 | 489) | 604 |
| v. Opie (145 U. S. 214, 12 Sup. Ct. 822) | 1640 | Webster Loom Co. v. Short (Fed. Cas. No. 17,843))..... | 644 |
| <i>Washington etc. R. Co. v. Bradley</i> | | Weed v. Central etc. R. Co. (40 C. C. | |
| (10 Wall. 299)....388, 486, | 620, | A. 819, 100 Fed. 162)..... | 1568 |
| v. Brown (17 Wall. 445)..... | 671 | v. Kellogg (6 McLean 44)..... | 1001 |
| <i>Washington Bank v. Arkansas</i> (20 How. 530) | 680 | Wehrman v. Conklin (155 U. S. 314, | |
| <i>Washington County v. Williams</i> (49 C. C. A. 621, 111 Fed. 801)....264, | 265 | 15 Sup. Ct. 129)..... | 18 |
| <i>Washington Market Co. v. Hoffman</i> (101 U. S. 112) | 214 | Weidenfeld v. Allegheny etc. Co. (47 Fed. 11) | 1371 |
| <i>Waterfield v. Rice</i> (49 C. C. A. 504, 111 Fed. 625) | 210 | Weir v. Bay State Gas Co. (91 Fed. 940) | 244 |
| <i>Waterhouse v. Comer</i> (55 Fed. 149, 19 L.R.A. 403)..... | 1512 | Weiss v. Haight etc. Co. (148 Fed. 399) | 1607 |
| <i>Waterman v. Banks</i> (144 U. S. 394, 12 Sup. Ct. 646)..... | 893 | Welling v. La Bau (32 Fed. 293).... | 862 |
| v. Merrill (Fed. Cas. No. 17,258, 2 Abb. (N. S.) 478 note) .. | 697 | Wells v. Gill (6 Fisher Pat. Cas. 89)..... | 1366 |
| <i>Waters v. Barril</i> (181 U. S. lxxiv, Appx.) | 204 | v. Miner (25 Fed. 583)....1816, 1818 | |
| <i>Watkins, Esq. v. (3 Pet. 198)</i> | 1443 | v. Oregon R. etc. Co. (15 Fed. 561) | 165 |
| <i>Watson v. Bonfils</i> (116 Fed. 157, 58 C. C. A. 585)..... | 314 | v. Oregon R. etc. Co. (19 Fed. 20, 9 Sawy. 601)....1426, | |
| v. Evers (13 Fed. 184) | 319 | 1443, 1444, 1450 | |
| <i>Watson v. Stevens</i> (53 Fed. 31)..... | 1285, | v. Smith (44 Miss. 296)..... | 947 |
| v. Sunderland (5 Wall. 74).... | 28 | Weisbach Light Co. v. Mahler (88 Fed. 427)..... | 804, 808 |
| <i>Watson v. U. S. Sugar Refinery</i> (15 C. C. A. 662, 68 Fed. 769, 34 U. S. App. 81).....278, | 293, | Wenham v. Switzer (48 Fed. 612).... | 1015 |
| <i>Watt v. Starke</i> (101 U. S. 247).... | 934, | Wertheim v. Continental etc. Co. (21 Blatchf. 246, 15 Fed. 716)....1028, 1114 | |
| 937, 938, 941, | 900 | West v. East Coast Cedar Co. (51 C. A. 416, 113 Fed. 742)... | |
| <i>Watts, In re</i> (190 U. S. 1)..... | 1427 | 1162, 1383, 1412, 1416 | |
| <i>Watts v. Waddle</i> (6 Pet. 389)....140, | 681 | v. Randall (2 Mason 181)....317, | |
| <i>Waukesha Water Co. In re</i> (116 Fed. 1011) | 391 | 318, 321 | |
| <i>Way v. Hygienic etc. Co.</i> (144 Fed. 870) | 442, 446, | v. Randall (Fed. Cas. No. 17,- 424) | 308 |
| <i>Wayman v. Southard</i> (10 Wheat. 1) W. B. Conkey Co. v. Russell (111 Fed. 417) | 69 | v. Woods (18 Fed. 665)..... | 208 |
| <i>Weatherbee v. American Freehold etc. Co.</i> (77 Fed. 528)....480, 618, | 619, 631, | Westerly Waterworks v. Westerly (77 Fed. 783) | 1402, 1403 |
| 632 | 632 | Western Electric Co. v. Capital Telephone etc. Co. (86 Fed. 769) | 1015 |
| <i>Weaver v. Alter</i> (8 Woods 152, Fed. Cas. No. 17,308)..... | 633 | v. Reedy (66 Fed. 168)..... | 955 |
| v. Field (114 U. S. 244, 5 Sup. Ct. 844, <i>affirming</i> 16 Fed. 22) | 1627 | Western Land etc. Co. v. Guinault (37 Fed. 523) | 261 |
| v. Norway Tack Co. (80 Fed. 700) | 213 | Western New York etc. R. Co. v. Penn Refining Co. (70 C. C. A. 23, 137 Fed. 343).....1532, 1533, 1617 | |
| <i>Webb v. Bowers</i> (Fed. Cas. No. 17,819) | 1204 | Western North Carolina R. Co. v. Drew (3 Woods 674)..... | 1399 |
| v. Salmon (3 Hare 251)..... | 382 | v. Drew (3 Woods 691)..... | 1021 |
| <i>Webster v. Buffalo Ins. Co.</i> (110 U. S. 386) | 209 | Western Union Tel. Co. v. American Bell Telephone Co. (60 C. C. A. 220, 125 Fed. 343)..... | 917 |

TABLE OF CASES.

1901

[References are to pages.]

| | | | |
|---|-----------------|---|---------------------------------|
| Western Union Tel. Co. v. Norman (77 Fed. 18)..... | 213 | Wheeler Bliss Mfg. Co. v. Pickham (69 Fed. 419) | 208 |
| v. Pennsylvania R. Co. 120 Fed. 362, 59 C. C. A. 113, 123 Fed. 33) | 1376 | Wheeling etc. R. Co. v. Cochran (85 Fed. 500) | 1555 |
| v. Philadelphia etc. R. Co. (124 Fed. 974)..... | 1366 | Wheless v. St. Louis (180 U. S. 379)..... | 215 |
| v. Poe (61 Fed. 469)..... | 213 | Whightsel v. Felton (95 Fed. 923)..... | 1526 |
| Western Wheeled Scraper Co. v. Ga- hagan (152 Fed. 648)..... | 410, | Whippany Mfg. Co. v. United Indu- rated Fibre Co. (87 Fed. 215, 30 C. C. A. 615)..... | 1370 |
| Westervelt v. Library Bureau (55 C. C. A. 436, 118 Fed. 824).... | 70, 549, 551 | Whipple v. Cumberland Cotton Co. (3 Story 84)..... | 1208 |
| Westinghouse Air Brake Co. v. Christensen Engineering Co. (123 Fed. 632) | 1448 | v. Hutchinson (4 Blatchf. 190, Fed. Cas. No. 17,517)..... | 1385, 1440, 1443 |
| v. Christensen Engineering Co. (126 Fed. 764)..... | 705 | Whitcomb v. Hooper (81 Fed. 946, 27 C. C. A. 19)..... | 408 |
| v. Kansas City Southern R. Co. (71 C. C. A. 1, 137 Fed. 26) | 244 | White v. Bower (48 Fed. 186)..... | 640 |
| v. New York etc. Co. (111 Fed. 741)..... | 569 | v. Crow (110 U. S. 184, 4 Sup. Ct. 71) | 1278 |
| Westminster Brymbo etc. Co. v. Clayton (36 L. J. Ch. 476)..... | 1343 | v. Crow (78 Fed. 98)..... | 1290 |
| West Portland etc. Assoc. v. Lowns- dale (17 Fed. 205)..... | 593 | v. Ewing (159 U. S. 36, 15 Sup. Ct. 1018) | 750 |
| West Pub. Co. v. Edward Thompson Co. (151 Fed. 188).... | 1111, 1135 | v. Ewing (69 Fed. 451, 18 C. C. A. 296, modifying 66 Fed. 2, 18 C. C. A. 276)..... | 400, 1658 |
| v. Edward Thompson Co. (152 Fed. 1019) | 1012 | v. Godbold (1 Madd. 269)..... | 689 |
| Wetherby v. Stinson (10 C. C. A. 248, 62 Fed. 173)..... | 1206 | v. Jones (Fed. Cas. No. 17,550)..... | 975 |
| Wetmore v. Rymer (169 U. S. 115) 210, 211 | | v. Joyce (158 U. S. 128).... | 301, 303, 436 |
| v. St. Paul etc. R. Co. (1 Mc- Crary 466)..... | 825 | v. Miller (15 Sup. Ct. 788, 158 U. S. 128)..... | 301, 302, 436 |
| Wetzel etc. R. Co. v. Tennis Bros. Co. (75 C. C. A. 266, 145 Fed. 458).. 401, | 382 | v. Toledo etc. R. Co. (24 C. C. A. 467, 79 Fed. 183).... | 1021, 1032 |
| Weymouth v. Lambert (3 Beav. 333)..... | 382 | v. Whitman (1 Curt. C. C. 494, Fed. Cas. No. 17,561)..... | 554 |
| W. G. Rogers Co. v. International Silver Co. (55 C. C. A. 83, 118 Fed. 188) | 1397 | Whitehead v. Entwhistle (27 Fed. 779) | 28 |
| Whalen v. Gordon (95 Fed. 305, 37 C. C. A. 70)..... | 659 | v. Shattuck (138 U. S. 146).... | 567 |
| Wharton v. Lowry (2 Dall. 384, Fed. Cas. No. 17,481)..... | 668 | Whitehead etc. Co. v. O'Callahan (180 Fed. 243) | 1064 |
| Wheaton v. Daily Tel. Co. (59 C. C. A. 427, 124 Fed. 61)..... | 1500, | Whitford v. Clark County (7 Sup. Ct. 306, 119 U. S. 522, reversing 18 Fed. 837) | 1001, 1048 |
| Wheeler v. Billings (72 Fed. 301, 18 C. C. A. 573)..... | 851 | Whiting v. U. S. Bank (13 Pet. 6).... | |
| v. McCormick (8 Blatchf. 267, Fed. Cas. No. 17,498).... | 514, | 739, 1161, 1183, 1255, 1258, 1259, 1261, 1262, 1264 | |
| v. Smith (81 Fed. 319)..... | 1548 | v. Wellington (10 Fed. 810).... | 1626 |
| v. Walton etc. Co. (64 Fed. 684)..... | 832 | Whitley v. Martin (3 Beav. 226).... | 127 |
| v. Walton etc Co. (65 Fed. 720) 365, 1575 | | Whitney v. New Orleans (4 C. C. 521, 54 Fed. 614) | 1606 |
| Wheeler etc. Mfg. Co. v. Howard (28 Fed. 741) | 1633 | Whittemore v. Amoakeag Nat. Bank (26 Fed. 819)..... | 291 |
| | | v. Amoskeag Nat. Bank (134 U. S. 527) | 291 |
| | | v. Patten (81 Fed. 527).... | 441, 476 |
| | | v. Patten (84 Fed. 51).... | 444, 462, 464, 471, 472, 622 |
| | | Whittle v. Artis (55 Fed. 919).... | 408 |
| | | Whyte v. Gibbee (20 How. 541).... | 502 |
| | | Wickliffe v. Owings (17 How. 51).... | 502 |
| | | Widaman v. Hubbard (88 Fed. 806). <td>743</td> | 743 |

[References are to pages.]

| | | | |
|---|---------------------------|--|--|
| Wiegand v. Copeland (14 Fed. 118). | 1194 | Williams v. Nottawa Tp. (104 U. S. 209) | 53, 213, 221, 1206 |
| Wiemer v. Louisville Water Co. (180 Fed. 246) | 28 | v. U. S. (138 U. S. 514, 11 Sup. Ct. 457) | 85, 326 |
| Wiggins v. Bethune (29 Fed. 51) | 190, 287 | Williamson v. Monroe (101 Fed. 322) | 11, 52 |
| v. Wiggins (1 Cranch C. C. 290, Fed. Cas. No. 17,627) | 1015 | v. Wilson (1 Bland 424) | 1480 |
| Wiggins Ferry Co. v. Ohio etc. R. Co. (142 U. S. 396) | 148, 680, 681, 682 | Willimantic Linen Co. v. Clark Thread Co. (24 Fed. 799) | 1242, 1245, 1247 |
| Wigton v. Boaler (108 Fed. 70) | 1540, 1541 | Willing v. Consequa (Pet. C. C. 301, Fed. Cas. No. 17,787) | 1042 |
| Wilcox v. Henry (1 Dall. 69) | 282 | Willis v. Terry (98 Fed. 8) | 462, 473 |
| Wilcox etc. Co. v. Farrand Organ Co. (139 Fed. 46) | 504 | Willitt v. Baker (138 Fed. 937) | 18 |
| Wilcox etc. Guane Co. v. Phoenix Ins. Co. (61 Fed. 199) | 554 | Willis v. Pauly (51 Fed. 257) | 62, 289 |
| Wilde v. Gibson (1 H. L. Cas. 626) | 141 | v. Russell (100 U. S. 621) | 1063 |
| Wilder v. New Orleans (87 Fed. 843, 81 C. C. A. 249) | 1487 | Wilmer v. Atlantic etc. R. Co. (2 Woods 410, Fed. Cas. No. 17,775) | 865, 1469, 1470 |
| Willey v. Sinkler (179 U. S. 58) | 211 | Wilson v. Barnum (1 Wall. Jr. 342, Fed. Cas. No. 17,786) | 924 |
| Wilkins v. Jordan (3 Wash. C. C. 226, Fed. Cas. No. 17,865) | 425, 1402 | v. Bastable (1 Cranch C. C. 394) | 1351 |
| Wilkinson v. Culver (25 Fed. 639) | 1544 | v. Blair (119 U. S. 387) | 212 |
| v. Delaware etc. R. Co. (28 Fed. 562) | 91 | v. City Bank (3 Summ. 422, Fed. Cas. No. 17,797) | 191, 208, 319 |
| v. Dobie (12 Blatchf. 298) | 1351 | v. Daniel (3 Dall. 401) | 209 |
| v. Washington etc. Co. (102 Fed. 28, 42 C. C. A. 140) | 1587, 1588, 1606, 1607 | v. Hastings Lumber Co. (108 Fed. 801) | 190 |
| v. Yale (6 McLean 16) | 1078 | v. Koontz (7 Cranch 202) | 504 |
| Willamette Iron Bridge Co. v. Hatch, (123 U. S. 1, 8 Sup. Ct. 811, reversing 19 Fed. 847) | 1280, 1281, 1282, 1286 | v. Oswego Tp. (151 U. S. 56, 14 Sup. Ct. 259) | 312, 319, 880, 849 |
| Willamette Valley, The (66 Fed. 565, 18 C. C. A. 685) | 1542 | v. Riddle (128 U. S. 608, 8 Sup. Ct. 255) | 924, 932, 938, 999 |
| Willard v. Davis (122 Fed. 368) | 118, 161 | v. Stewart (1 Cranch C. C. 128, Fed. Cas. No. 17,837) | 433 |
| v. Wood (135 U. S. 306) | 86 | v. Todd (1 Myl. & C. 42) | 1810 |
| v. Wood (17 Sup. Ct. 176, 164 U. S. 502) | 80, 804 | v. Wilson (1 Jac. & W. 457) | 359, 360 |
| Williams v. Bankhead (10 Wall. 563) | 308, 811, 318 | v. Winter (6 Fed. 18) | 1638 |
| v. Byrne (Hempat. 472, Fed. Cas. No. 17,718) | 749, 750 | Winans v. McKean R. etc. Co. (Fed. Cas. No. 17,862) | 778 |
| v. Cattie (10 N. J. Eq. 543) | 645 | Winchell v. Carll (24 Fed. 855) | 1625 |
| v. Corwin (Hopk. Ch. 471) | 952 | Winchester v. Davis Pyrites Co. (67 Fed. 45, 14 C. C. A. 300) | 832 |
| v. Crabb (117 Fed. 199, 54 C. C. A. 218, 59 L.R.A. 425) | 21, 232, 826 | Winter v. Ludlow (Fed. Cas. No. 17,891) | 708 |
| v. Empire Transp. Co. (Fed. Cas. No. 17,720) | 504 | v. Swinburne (8 Fed. 49) | 745 |
| v. Hintermeister (26 Fed. 880) | 1502 | Winters v. Hub Min. Co. (57 Fed. 287) | 1000 |
| v. Jackson (107 U. S. 478, 2 Sup. Ct. 814) | 189 | Winthrop Iron Co. v. Meeker (109 W. S. 180) | 1161 |
| v. Morgan (111 U. S. 684, 4 Sup. Ct. 688) | 825, 826, 864, 1282, 1608 | Wise v. Nixon (78 Fed. 203) | 183 |
| v. Neely (134 Fed. 1, 67 C. C. A. 171, 69 L.R.A. 232) | 28 | Wisner v. Ogdan (4 Wash. C. C. 631, Fed. Cas. No. 17,914) | 347, 351, 568 |
| | | Wiswall v. Sampson (14 How. 52) | 1458, 1470, 1496, 1503, 1505, 1507, 1545 |
| | | Witherbee v. Witherbee (17 App. Div. 181, 45 N. Y. Supp. 297) | 1536 |

TABLE OF CASES.

1908

[References are to pages.]

| | | | |
|---|------------------|---|------------------|
| Witman v. Hubbell (42 Fed. 688) .. | 1870 | Woodruff v. North Bloomfield Gravel Min. Co. (45 Fed. 129) .. | 1141 |
| Witters v. Bowles (28 Fed. 218) .. | 1025 | Woods v. Woodson (40 C. C. A. 525, 100 Fed. 518) .. | 395 |
| v. Bowles (81 Fed. 5) .. | 1152, 1245 | Woodside v. Ciceroni (98 Fed. 1, 35 C. C. A. 177) .. | 221 |
| v. Bowles (32 Fed. 189) .. | 1172 | Woodward v. Boston Lasting Mach. Co. (11 C. C. A. 353, 63 Fed. 609) .. | 1285 |
| v. Bowles (82 Fed. 765) .. | 1246 | v. Spurr (141 Mass. 288) .. | 59 |
| v. Bowles (43 Fed. 405) .. | 905 | v. Blair (112 U. S. 8, 5 Sup. Ct. 6) .. | 1656 |
| Wm. G. Rogers Co. v. International Silver Co. (118 Fed. 133, 55 C. C. A. 88) .. | 1401 | Woodworth v. Edwards (3 Woodb. & M. 120, Fed. Cas. No. 18,014) .. | 1852 |
| Wolf v. Connecticut Mut. L. Ins. Co. (1 Flipp. 377, Fed. Cas. No. 17,924) .. | 1192 | v. Hall (1 Woodb. & M. 248) .. | 1399 |
| Wolfe v. Hartford L. etc. Co. (148 U. S. 389, 13 Sup. Ct. 602) .. | 187, 191 | Woollet v. Roberts (1 Ch. Cas. 64) .. | 984 |
| v. Lewis (19 How. 280) .. | 1224 | Woolridge v. McKenna (8 Fed. 680) .. | 391 |
| Wollensak v. Reither (115 U. S. 101, 5 Sup. Ct. 1137) .. | 120 | Wooster v. Blake (7 Fed. 816) .. | 536 |
| Wolverton v. Nichols (119 U. S. 485) .. | 68 | v. Clark (9 Fed. 854) .. | 1015 |
| Wonderly v. Lafayette County (77 Fed. 665) .. | 742 | v. Gumbinner (20 Fed. 167) .. | 872 |
| Wong Him v. Callahan (119 Fed. 381) .. | 950 | v. Handy (21 Fed. 51) .. | 1230 |
| Wong Wai v. Williamson (103 Fed. 384) .. | 1448 | v. Handy (23 Fed. 49) .. | 1160, 1192, 1203 |
| Wood v. Beadell (3 Sim. 273) .. | 1350, 1852 | v. Howe Sewing Mach. Co. (10 Fed. 666) .. | 1013 |
| v. Braxton (54 Fed. 1005) .. | 1409 | v. Simonson (16 Fed. 680, 20 Fed. 316) .. | 903 |
| v. Carpenter (101 U. S. 125) .. | 111 | Worcester v. Truman (Fed. Cas. No. 18,043) .. | 1435 |
| v. Collins (8 C. C. A. 522, 60 Fed. 189) .. | 620 | Worden v. Sears (121 U. S. 14, 7 Sup. Ct. 814) .. | 1444, 1451 |
| v. Davis (18 How. 467) .. | 334 | World's Columbian Exposition v. U. S. (6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654) .. | 176 |
| v. Mann (1 Sumn. 506, Fed. Cas. No. 17,951) .. | 521 | Wormeley v. Wormeley (Fed. Cas. No. 18,047, 1 Brock. 330) .. | 523 |
| v. Mann (1 Sumn. 578) 461, 462, | 463 | v. Wormeley (8 Wheat. 421) 190, 335, 351 | |
| v. Mann (2 Sumn. 316, Fed. Cas. No. 17,953) .. | 1070, 1246, 1272 | Worrall v. Harford (8 Ves. Jr. 4) .. | 1218 |
| v. New York etc. R. Co. (70 Fed. 741) .. | 1586 | Worswick Mfg. Co. v. Philadelphia (30 Fed. 625) .. | 1149 |
| v. Oregon Development Co. (55 Fed. 901) .. | 1491, 1611 | Worth v. Wharton (122 N. Car. 376, 29 S. E. 370) .. | 1539 |
| v. Safe Deposit Co. (128 U. S. 416, 9 Sup. Ct. 181) .. | 1578 | Worth Mfg. Co. v. Bingham (116 Fed. 785, 54 C. C. A. 119) .. | 1854, 1855 |
| v. Wagner (2 Cranch 9) .. | 188, 191 | Wren v. Spencer Optical Mfg. Co. (5 B. & A. Pat. Cas. 61, Fed. Cas. No. 18,062) .. | 488, 975, 977 |
| Woodbury v. Allegheny etc. R. Co. (72 Fed. 371) .. | 534, 1827, 1628 | Wright v. Castle (3 Meriv. 12) .. | 359, 360 |
| Woodcock v. Bennet (1 Cow. 712) .. | 982 | v. Frank (61 Miss. 82) .. | 637 |
| Woodfin v. Phoebus (80 Fed. 289) .. | 572 | v. Hollingsworth (1 Pet. 165) .. | 198 |
| Woodhouse v. Meredith (1 Jac. & W. 207) .. | 683 | v. Mudie (1 Sim. & St. 266) .. | 1211 |
| Woodland Bank v. Heron (120 Cal. 614, 52 Pac. 1006) .. | 1498 | v. Phipps (90 Fed. 558) .. | 1641 |
| Woodman v. Kilbourn Mfg. Co. (1 Biss. 546) .. | 1351 | v. Shumway (1 Biss. 28, Fed. Cas. No. 18,093) .. | 1631 |
| Woodmanse etc. Mfg. Co. v. Williams (15 C. C. A. 520, 68 Fed. 489) .. | 48, 505, 569 | v. Skinner (186 Fed. 694) .. | 100 |
| v. Dubuque etc. R. Co. (80 Fed. 91) .. | 156, 972 | v. West (1 Cranch C. C. 303, Fed. Cas. No. 18,102) .. | 483 |
| v. North Bloomfield Gravel Min. Co. (18 Fed. 758) .. | 1170 | | |

[References are to pages.]

| | | | |
|--|------------------|---|---------------------|
| <i>Wylie v. Coxe</i> (14 How. 1)..... | 1242 | <i>Young v. Mercantile Trust Co.</i> (140 Fed. 61)..... | 561 |
| <i>v. Coxe</i> (15 How. 415)..... | 58, 1223 | <i>v. Montgomery etc. R. Co.</i> (2 Woods 606, Fed. Cas. No. 18,166)..... | 1467, 1468, 1472 |
| <i>Wyman v. Bowman</i> (62 C. C. A. 189, 127 Fed. 257)..... | 120 | <i>v. Porter</i> (3 Woods 342, Fed. Cas. No. 18,171)..... | 22 |
| <i>v. Russell</i> (Fed. Cas. No. 18, 115)..... | 1640 | <i>v. Wempe</i> (46 Fed. 354)..... | 1482 |
| Y. | | | |
| <i>Yale Lock Mfg. Co. v. Colvin</i> (14 Fed. 269)..... | 1192 | <i>Youngblood v. Sexton</i> (32 Mich. 406)..... | 265 |
| <i>Yardley v. Clothier</i> (49 Fed. 341)..... | 1589 | <i>Youngstown Coke Co. v. Andrews Bros. Co.</i> (79 Fed. 669)..... | 199 |
| <i>Yeager v. Wallace</i> (44 Pa. St. 294)..... | 1537 | <i>Youtsey v. Hoffman</i> (106 Fed. 693)..... | 1489 |
| <i>Yeatman v. Bradford</i> (44 Fed. 536)..... | 28 | <i>Yuengling v. Johnson</i> (1 Hughes 607, Fed. Cas. No. 18,195)..... | 1345, 1353 |
| <i>Yellow Aster Min. etc. Co. v. Winchell</i> (95 Fed. 218)..... | 205 | Z. | |
| <i>Yerrington v. Putnam</i> (Fed. Cas. No. 18,187)..... | 1260, 1261, 1277 | <i>Zacher v. Fidelity Trust etc. Co.</i> (45 C. C. A. 480, 106 Fed. 598)..... | 1497, 1545 |
| <i>Ye Seng County v. Corbitt</i> (9 Fed. 428)..... | 1201 | <i>Zantzinger v. Weightman</i> (2 Cranch C. C. 478, Fed. Cas. No. 18,202)..... | 1337, 1338 |
| <i>York v. Pilkington</i> (1 Atk. 282)..... | 261 | <i>Ziegler v. Lake St. etc. R. Co.</i> (22 C. C. A. 465, 76 Fed. 662, 69 Fed. 176)..... | 269, 293 |
| <i>v. Texas</i> (187 U. S. 20)..... | 405 | <i>Zimmerman v. Carpenter</i> (84 Fed. 747)..... | 52 |
| <i>York Mfg. Co. v. Illinois Cent. R. Co.</i> (3 Wall. 113)..... | 1098 | <i>v. So Belle</i> (25 C. C. A. 518, 80 Fed. 417)..... | 580, 581, |
| <i>Young, In re</i> (7 Fed. 855)..... | 1546 | <i>v. Litchfield</i> (21 Fed. 196)..... | 585, 552, 554, 1467 |
| <i>v. Cushing</i> (4 Biss. 456, Fed. Cas. No. 18,156)..... | 817 | <i>Zunkel v. Litchfield</i> (21 Fed. 196)..... | 550 |
| <i>v. Grand Trunk R. Co.</i> (9 Fed. 348)..... | 795 | <i>Zych v. American Car etc. Co.</i> (127 Fed. 721)..... | 1083 |
| <i>v. Grundy</i> (6 Cranch 51)..... | 452, 961, 1403 | | |
| <i>v. Lippman</i> (9 Blatchf. 277, Fed. Cas. No. 18,160)..... | 114, 115, 1858 | | |

INDEX.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

ABANDONMENT:

 Of demurrer, 962
 Of proceedings before examiner, see **PROCEEDINGS BEFORE EXAMINER**

ABATEMENT:

 Appointment of receiver as ground for, 2669, 2570
 Bill of revivor, see **BILL OF REVIVOR**
 Death of husband suing jointly with wife, 1208
 Death of party defendant, 1207
 Death of party plaintiff, 1206
 Dissolution of corporation, 1205
 Distinction between abatement at law and in equity, 1203
 Entire abatement, 1206
 Marriage of female plaintiff or defendant, 1208
 Necessity of revivor, see **REVIVOR**
 Partial abatement, 1206
 Plea in, see **PLEA**
 Remedy for abatement of suit, 1202
 Supplemental bill not available in case of, 1202

ACCIDENT:

 Impeachment of decree, see **BILL TO IMPEACH DECREE**

ACCORD AND SATISFACTION:

 Amendment to avoid, 1093

ACCOUNTS AND ACCOUNTING:

 Account stated as plea in bar, 832
 Amendment to avoid account stated, 1093
 Answer as evidence, 1609
 Cross bill, necessity for, 1026
 Equity jurisdiction of suits for, 64, 65
 Forms relating to, see **FORMS**
 Plea to account stated, 843
 Prayer for relief, accounting under, 249
 Receivers' accounts, see **RECEIVERS**
 Reference, see **REFERENCE**
 Release, plea of, 882
 Splitting causes of action, 397

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

ACTION AT LAW (see also **DEFENSE AT LAW**):

- Action instead of issue to jury, see **ISSUES TO JURY**
- Distinguished from suit in equity, 185
- Equitable defense in, 16
- Equitable title to legal right of action, 57
- Remedy at law, see **REMEDY AT LAW**
- Separation of law and equity, see **SEPARATION OF LAW AND EQUITY**

ACTIONS:

- Splitting causes of action, 397

ACTS OF CONGRESS:

- Regulating practice, 107

ADDRESS:

- Of bill, see **BILL**
- Of writ of subpoena, see **SUBPOENA, WRIT OF**

ADMINISTRATORS:

- See **EXECUTORS AND ADMINISTRATORS**

ADMIRALTY:

- Jurisdiction of, in District Courts, 3

ADMISSION:

- Attorneys and counselors in Supreme Court, 567

ADMISSIONS:

- Allegation of facts as admission, 739, 740
- Amended bill, 1584
- Charging in bill, 223, 224
- Conclusiveness of admissions of bill against plaintiff, 1583
- Construction of admissions in answer, 815, 1589
- Constructive admissions:
 - Definition, 1580
 - Effect and necessity of proof, 1580, 1581
 - Illustrations, 1580
 - Insufficiency of answer as constructive admission, 1581
- Curing defective allegations, 181
- Demurrer, admissions by, 926-928
- Depositions, admissions by, 1832
- Explicit admissions as dispensing with proof, 1579
- In answer:
 - Allegation of facts, 739, 740
 - Allegations of bill generally, 1606
 - Answer of infant, 1590
 - Construction, 815, 1589
 - Curing defects by, 181
 - Effect of replication, 1588
 - Insufficiency of answer as constructive admission, 1581
 - Limitation of rule as to distinct admissions, 1594

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

ADMISSIONS — *continued*

In answer — *continued*

Separate and disconnected admissions, 1591-1595

What constitute, 1587

Rehearing to admit evidence of admissions, 2101

ADVANCEMENTS:

Preferential claims on receivership funds, 2746

AFFIDAVIT:

Agent, propriety of affidavit by, 1302

Amendment, affidavit on, 1104

Application to set aside pro confesso, 1574

Authentication, 1308

Bill of review, affidavit on petition for leave to file, 2162

Conclusion, 1305

Contempt proceedings, see CONTEMPT

Contents and form in general, 1305

Costs:

Contesting charges in bill of costs, 2053

Verifying costs and disbursements, 2052

Definition, 1300

Demurrer, affidavit of defendant to, see DEMURRER

Entitling, 1303

Evidence:

Admissibility at final hearing, 1300

Admission against party making, 1307

Before master on reference, 1442

Weight as affected by circumstances attending execution, 1305

Filing, necessity of, 1300

Forms of, see FORMS

Injunction cases, see INJUNCTIONS

Interlocutory instrument, 1300

Interpleader, affidavit of noncollusion, 2247

Knowledge of facts by affiant, 1302

Nature and use in general, 1300

Ne exeat, see NE EXEAT

Oath:

Resident in foreign country, 1306

Who may take for use in federal court, 1308

Party, propriety of affidavit by, 1302

Power to compel making, 1801

Record, affidavit as part of, 1300

Signature, 1306

Solicitor, propriety of affidavit by, 1302

Special motion, affidavit of service of notice, 1285

Status as evidence at final hearing, 1300

Use against party filing, 1307

Venue, 1304

Voluntary character, 1301

Who may make, 1302

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

AFFIRMATION:

In lieu of oath to answer, 705

AGENTS:

Reimbursement for costs, 2041

Substituted service of process on, see SERVICE OF PROCESS

AGGREGATION OF CLAIMS:

See AMOUNT IN CONTROVERSY

ALIENS:

Alien enemy:

Capacity to be sued, 498

Capacity to sue, 448-451

Suits between citizens and aliens, see DIVERSITY OF CITIZENSHIP

ALIGNMENT OF PARTIES:

See PARTIES

AMBIGUITY:

Answer or cross bill, 1024

Construction of ambiguous allegations against pleader, 290

Plea, 856

AMENDMENT:

Absolute right:

Affidavit, 1104

After answer, 1106

Costs, 1104

Early stages of litigation, 1104

Equity rule, 1104

Injunction bill, 1105

Leave of court, see *infra*, Leave of court

Matters of form, 1104

Small matters, 1104, 1105

Accord and satisfaction, amendment to avoid, 1093

Account stated, amendment to avoid, 1093

Adding plaintiffs with conflicting interests, 554

Affidavit on amendment, 1104

Amount in controversy, 1087

Answer:

Admissions made under mistake of law, 1150

Answer after amendment of bill, see ANSWER

Application for leave to file, 1151, 1152

Application of English practice, 1142

Caption, 1141

Clerical errors, 1141

Denial of amendment on affidavit of falsity, 1147

Development of rules, 1140

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

AMENDMENT — *continued*

Answer — *continued*

Discretion of court:

- Exercise of discretion, 1147
- Limits of discretion, 1146
- Oath waived, 1154
- Review of discretion, 1146

Distinction between amended and supplemental answers, 1144, 1145

Effect of waiver of oath in bill, 1154

Equity rule, 1145

Examination of original pleadings and proof, 1147

Exception for impertinence, 1153

Furtherance of justice, 1142

Matters of form, 1141

Matters of substance, 1142

Mistake in engrossing, 1141

Mode of making amendments, 1141, 1144

Order granting leave to amend, 1153

Peculiarities of practice, 1140

Relation of amended answer to original, 1143

Renewal of application for leave to file, 1152

Setting up new defense, 1142, 1147

Strictness of law, 1154

Time of amendment, 1148, 1149

Application for leave to amend (see also *infra*, Leave of court):

Affidavit, 1083, 1113

Answer, 1147-1152

Counter affidavit, 1113

Demurrer, 1138

Hearing together with exceptions to answer, 1113

Manner of making application, 1083

Small matters, 1105

Submission of proposed amendments, 1113

Time of application, 1083, 1121

Time of application to amend answer, 1148, 1149

Waiver of conditions, 1113

Basis of law, 1075

Bill:

Addition as new matter, 1086

Addition of new parties, 1086, 1361

Alignment of parties, 1086

Alternative remedy, 1085

Amount in controversy, 1087

Continuation of original bill, 1102

Diversity of citizenship, 1087

Explanation of plaintiff's laches, 1087

Federal question, 1087

In lieu of special replication, 790, 791, 1093

Jurisdiction of court, 1087

{References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2224; III, §§ 2225-2297.]

AMENDMENT — continued

Bill — continued

- Matters amendable in general, 1086
- Nature of matter that may be introduced, 1087
- New cause of action, see *infra*, Cause of action
- New matter, 1086
 - Abandonment of original cause, 1098
 - Consistent cause of action, 1099
 - Demurrer, 1091
 - Discretion of court, 1096, 1097
 - Introduction of newly discovered facts generally, 1099
 - Matter not appropriate for amendment, 1090
 - Matter of special replication, 1093
 - Relaxation of rule, 1092
- Obviating dismissal, 1342, 1343
- Plea sustained, 883
- Prayer, see *infra*, Prayer
- Relation back of amendment, 1108
- Relation of amended to original bill, 1108
- Removal from state to federal court, 1095
- Right of defendant to compel amendment, 1084
- Right of plaintiff to amend, 1084
- Special defense, amendment to meet, 281
- To include special replication, 898
- Waiver of oath to answer, 1094

Bill of revivor, 1218

Cause of action:

- Addition of consistent cause of action, 1086
- Demurrer, 1091
- Discretion of court, 1096, 1097
- Objection to introduction of new cause of action, 1098
- Relaxation of rule against new matter, 1092
- Striking out amendment changing cause of action, 1118
- Waiver by failure to object to introduction of new cause, 1091

Clerical errors, 1104

- Considerations affecting allowance, 1082
- Copy of bill, service of, 1130
- Correction of errors in dates, 1104

Costs:

- After answer, plea, or demurrer, 1108
- After copy taken from clerk's office, 1104
- After demurrer filed, 1117
- After demurrer sustained, 966, 1118
- Amendment of absolute right, 1104
- Before copy taken from clerk's office, 1104
- Discretion of court, 1115
- Indulgence in regard to, 1115
- Reasons for imposing costs, 1115
- Solicitor's fee, 1115

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2235-2897.]

AMENDMENT — *continued*

Decree:

- Clerical errors, 2065, 2066
- Cognizance of motion, 2085
- Consent decree, 2082
- Court's control over decree during term, 2063
- Decree entered by mistake or misrepresentation, 2068
- Effect of enrolment, 1977
- Effect of erroneous amendment, 1081
- Equity rule, 2065
- Federal decrees, 2066
- Final decree:
 - Adjournment *sine die*, 2097
 - After end of term, 2074
 - Appeal as affecting right, 2078
 - Determination of end of term, 2078
 - During term, 2073
 - Keeping minutes open until following term, 2077
 - Meaning of "final," 2078
 - Statutes, 2076
- Foreclosure decree, 2865
- General power of court to alter decree, 2063-2068
- Inconsistent decrees, 2087
- Interlocutory decrees, 2069-2071
- Judicial and clerical errors distinguished, 2067
- Mode of enforcement, 2072
- Mode of proceeding, 2064
- Right to change before entry, 1955
- Second decree, 2087

Defects of form under statutes, 1076

Defects of substance under statutes, 1077

Demurrer:

- Amendability in general, 1138
- Direction by court *ex mero motu*, 1138
- Leave of court, 1138
- Demurrer after amendment, availability of, 917
- Deposition, 1760, 1816
- Description of premises, 1104
- Determination of character of bill as amended or original, 1112
- Discretion of court:
 - Ability to produce evidence in support of amendment, 1082
 - After demurrer, 967, 1117, 1118
 - After replication filed, 1107
 - Amendment of answer at or after hearing, 1148, 1149
 - Answers, 1146, 1147, 1154
 - At or after hearing, 1122, 1123, 1124, 1148, 1149
 - Circumstances of particular case, 1080
 - Considerations affecting discretion generally, 1082

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

AMENDMENT — *continued*

Discretion of court — *continued*

- Consistency with original pleading, 1097
- Contradictory amendment, 1082
- Costs, 1115
- Falsity of amendment, 1082
- Introduction of new cause of action, 1096
- Jurisdictional questions, 1082
- Laches, 1082
- Leave of court, *see infra*, Leave of court
- Matters of substance, 1142
- Promotion of justice, 1082
- Review, 1081
- Rules of court, 1079
- Statutes, 1079, 1080
- Time of application as affecting right to amend, 1121

Diversity of citizenship, 1087

Duty to furnish copy, 1104

Effect of erroneous amendment on validity of decree, 1081

Equity rules, 1079

Exceptions to master's report, 1489

Exhibits amounting to amendment, 1084

Federal question, 1087

Filing:

- Abandonment of amendment by failure to file, 1114
- Application for leave to file amended answer, 1151, 1152
- Striking out for improper filing, 1116
- Time of filing, 1114

Filling blanks, 1104

Foreclosure decree, 2865

Form of amended bill, 1110

Furtherance of justice, 1083, 1086, 1142

General principles, 1074-1083

Imposition of term where demurrer sustained, 966

Infants, amendments in behalf of, 1083

Injunction:

Bill, 1105

Effect of amendment of bill on prior injunction, 1136

Insane persons, 1083

Intervention, petition of, 1137

Jurisdiction of court, 1087

Laches, amendment to explain, 1087

Leave of court:

Absolute right to amend, *see supra*, Absolute right

After replication and proof, 1107

After setting down on bill and answer, 1107

Amendment of answer at or after hearing, 1148, 1149

Application, *see supra*, Application for leave to amend

Demurrers, 1138

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

AMENDMENT — *continued*

Leave of court — *continued*

Discretion of court, see *supra*, Discretion of court

Equity rule, 1106, 1107

Matter of special replication, 1093

Order granting leave to amend answer, 1153

Order specifying particular amendment, 1113

Recital of leave in record, 1108

Withdrawal of replication, 1108

Liberality in allowance, 1074, 1078

Lis pendens on amendment, 1102

Matters of form, 1104

Misnomer of parties, 1104

Mode of making amendments:

Answer, 1141, 1144

Change on face of original bill, 1109

Filing separate amended bill, 1109, 1110

Interlineations, 1109

Marginal additions, 1109

Recital of original bill in amended bill, 1110

Multifariousness not caused by germane amendment, 439

Names of parties, 1105

Necessity for allowance in general, 1074

Parties:

Addition of new parties, 1086, 1088

Alignment of parties, 1086, 1088

Names of parties, 1105

Plea setting up nonjoinder, 1139

Striking out parties, 1086, 1088

Transposition of parties, 1086, 1088

Pertinency to controversy required, 1083

Petition of intervention, 1137

Plea, 1139

Prayer:

Change of prayer, 1086

For making defendants, 1111

Insertion of prayer for alternative relief, 1101

Relief adapted to case made and proved, 1100

Process:

New process, 1086

Subpoena, when necessary on amended bill, 1129

To bring in new parties to amended bill, 611

Relation back of amendment, 1103

Relation of amended to original bill, 1102

Release, amendment to avoid, 1093

Remand to lower court for amendment, 1126, 1127

Residence of parties, 1105

Res judicata:

Amendment to avoid, 1093

Failure to amend, 1085

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

AMENDMENT — continued

Right to amend:

- Absolute right, *see supra*, Absolute right
- Amendment requiring new answer not favored, 1128
- Defendant's right to compel amendment of bill, 1084
- Demurrer to bill sustained, 966, 967
- Discretion of court, *see supra*, Discretion of court
- Effect of scope of answer on right, 1124
- Leave of court as affecting, *see supra*, Leave of court
- Plaintiff's right to amend bill, 1084
- Time as affecting, *see infra*, Time of amendment

Service of copy of bill, 1130

Special defense, amendment to meet, 231

Statutes:

- Defects of form, 1076
- Defects of substance, 1077
- Discretion under, 1079, 1080
- Judiciary Act, 1075
- Liberality of application, 1078
- Revised Statutes of U. S., 1075
- Statute of Jeofaria, 1075

Statutes of limitations:

- Amendment to avoid, 1093
- Striking out, 1104, 1116
- Submission of proposed amendments to court, 1118
- Summary of principles, 1083

Supplemental bill:

- Amendment and supplemental bill compared, 1156
- Amendment instead of supplemental bill, 1156, 1157
- Introducing new cause of action, 1092
- Terms on allowance, 1083, 1115
- Time of amendment:
 - After answer, plea or demurrer, 1106
 - After demurrer filed, 1117, 1119
 - After demurrer sustained, 965, 1118, 1120, 1121
 - After final decree, 1128
 - After or at hearing, 1122, 1128, 1124
 - Answers, 1148, 1149
 - Final hearing, 1923
 - Prejudice by delay, 1083
 - Remand to lower court for amendment, 1126, 1127
 - Striking out unnecessary party, 1088
 - Withdrawal of admission, 1142

AMICUS CURIAE:

- Right to appear at hearing, 1907

INDEX.

1015

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

AMOUNT IN CONTROVERSY:

Aggregation of claims:

- Claims held by different plaintiffs, 368, 370
- Creditor's bill, 369
- Effect of state statutes and practice, 371
- Separate claims held by one plaintiff, 367

Allegations of:

- Colorable amount, 362
- Conclusiveness of plaintiff's allegations, 360, 361, 365
- Definiteness and certainty required, 368
- General averment, sufficiency of, 357
- Good faith required, 362
- Necessity in suit based on money demand, 365
- Part of bill appropriate for allegation, 366
- Presumption in favor of allegation, 365
- Suits to enforce political rights, 365

Amendment, 1087

- Attorney's fee, whether taken into account in ascertaining, 363
- Costs, whether taken into account in ascertaining, 363
- Determination of issue, 364
- Interest, whether taken into account in ascertaining, 363
- Jurisdiction as affected by, 354, 359
- Matured coupons on bonds, whether taken into account in ascertaining, 363
- Objection on appeal, 365
- Partial payment, effect of, 362
- Proof where no money demand, 366
- Value at time when suit brought, 369

ANCILLARY PROCEEDINGS:

- Appointment of receivers, see RECEIVERS
- Bill of review, see BILL OF REVIEW
- Bill of revivor, see BILL OF REVIVOR
- Bill to construe decree, 1243
- Bill to effectuate decree, see BILL TO EFFECTUATE DECREE
- Classification, 1251
- Conditions under which sustainable, 1232, 1233
- Consolidation of principal and ancillary suits, 1213
- Court in which maintainable, see *infra*, Jurisdiction
- Cross bill, see CROSS BILL
- Definition, 1228
- Dependent bill (see also DEPENDENT BILL), 1246
- Dismissal on dismissal of principal suit, 1255
- Equitable defense in action at law, 1235
- Equitable proceeding ancillary to legal, 1233
- Examples, 1228
- Interpleader, see INTERPLEADER
- Intervention, see INTERVENTION

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

ANCILLARY PROCEEDINGS — *continued*

Jurisdiction:

- Ancillary receivers, 2694
- Attack on jurisdiction of principal suit, 1230
- Averment of jurisdiction, 312, 1229
- Bill of review, 1240
- Bill of revivor, 1239
- Bill to construe decree, 1243
- Bill to enforce decree, 1243
- Conclusiveness of jurisdiction of principal cause, 1229
- Court in which maintainable, 1233
- Cross bill, 1234
- Effect of end of main litigation, 1242, 1253, 1255
- Interpleader, 1237
- Property in custody of court, 1246-1255
- Receivership suits, 1229, 1244, 2694
- Reservation in decree, 1242
- Suit to aid or enjoin action at law, 1235
- Suit to prevent fraudulent use of decree, 1241
- Suit to stay legal proceedings, 1236
- Supplemental bill, 1238
- New cause of action, 1252
- "Original" suits, 1231
- Parties, 1248
- Peculiarity of federal practice, 1231
- Petition *pro interesse suo* (see also INTERVENTION), 1246, 1364
- Pleading and practice generally, 1254
- Property in custody of court:
 - Basis of proceedings, 1247
 - Claim of title arising out of seizure, 1249
 - Dependent bill, 1246
 - Effect of loss of custody, 1253
 - Manner of asserting right, 1246
 - Petition *pro interesse suo*, 1246
 - Property not in actual custody, 1250
- Receivership suits, see RECEIVERS
- Reformation of deed, 1236
- Review of injunction granted by court of ancillary jurisdiction, 2387
- Stay of proceedings in ejectment, 1236
- Suit to aid or enjoin action at law, 1235
- Suit to prevent fraudulent use of decree, 1241
- Supplemental bill, see SUPPLEMENTAL BILL

ANNUITIES:

- Reference to ascertain value of, 1399

ANOTHER SUIT PENDING:

- Argument of sufficiency of plea, 914

INDEX.

1917

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

ANOTHER SUIT PENDING — *continued*

Continuance for, 1320
Demurrer, 933
Form of plea in abatement, *see FORMS*
Plea in abatement, 830
Reference to ascertain truth of plea, 915, 916

ANSWER:

Accompanying petition to intervene, 1360
Admission by allegation of facts, 739, 740
Adoption of answer of codefendant, 690
After amendment of bill:
 Cross bill, 1132
 Effect of previous *pro confesso*, 1134
 Formal amendment, 1132
 Immaterial amendment, 1132
 Necessity of new answer in general, 1132
 Restriction of answer to new matter, 1131
 Right of defendant in general, 1131
 Taking *pro confesso* for failure to answer, 1135
 Time for filing new answer, 1133
 Waiver of filing out of time, 1133
Allegation of facts as evidence, 739, 740
Amendment, answer after, *see supra*, After amendment of bill
Amendment of, *see AMENDMENTS*
Analogy of plea to answer, 825
Analogy to deposition, 1140
Answer in support of plea:
 Answer as evidence on argument of plea, 995
 Answer in *subsidiary*, 1008
 Bill charging fraud or combination, 992, 993
 Bill setting up equitable circumstances, 991
 Concurrent use of answer and other pleadings, 994
 Corroboration of plea by answer, 996, 997
 Determination of necessity, 990
 Direction to particular matters in bill, 988
 Discovery as affected by plea, *see infra*, Discovery by answer
 Exceptions for insufficiency, 1006
 Nature, necessity, and use of, 989, 996, 997, 1007
 Necessity where bill does not charge evidence, 1001
 Necessity where bill does not require discovery, 1000
 Necessity where oath waived in bill, 1003, 1004
 Particularity of denials, 998
 Plea not overruled by discovery in answer, 984
 Responsiveness to interrogatories, 1002
 Testing plea where answer too broad, 1005
 Theory of requirement, 996
 When necessary in general, 989

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

ANSWER — *continued*

- As evidence, see **EVIDENCE**
- By guardian *ad litem*, 491
- Caption, 691
- Certificate of counsel as to merits, 700
- Construction of admissions in answer, 815
- Constructive admissions, 740
- Contempt proceedings:
 - Defense by answer generally, 2373, 2374
 - Weight of answer at law, 2479
 - Weight of answer in equity, 2480
- Corporation defendant, who may make, 688
- Costs on sustaining exceptions to answer, 782
- Cross bill:
 - Answer and cross bill combined, 1054
 - Cross bill taken as answer, 1022
 - Duty to answer dependent on answering original bill, 1067
- Decree *pro confesso* for failure to answer, 678, 1552
- Defense by answer:
 - Affirmative defenses, 742
 - Allegation of facts, 739, 740
 - Avoidance of case made in bill, 742, 743
 - Conclusions of law, 748
 - Defendant bound by defense alleged, 744
 - General traverse, 741 .
 - Hearing on bill and answer, see **HEARING ON BILL AND ANSWER**
 - Inconsistent defenses, 750, 751
 - Objection for inconsistency, 753
 - Infringement of patent, 746
 - Manner of pleading, 743, 744
 - Matter embodied in overruled plea, 887
 - Matters appropriate for cross bill, 1023
 - Numerous defenses, 749
 - One defense pleaded in two ways, 752
 - Payment, 747
 - Proof of defense not specially pleaded, 744, 745
 - Set-off, 747
 - Surplusage, 753
 - Testing sufficiency of defense, 810, 811
- Defense to merits, 886
- Definition, 683
- Demurrer overruled by answer, 974
- Demurrer, plea, and answer to same bill, 975, 978
- Demurrer to answer improper, 811, 917
- Denial of information and belief, 726
- Denial of knowledge, 728
- Discovery by answer (see also **DISCOVERY**):
 - Answer containing plea in bar, 729

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

ANSWER — *continued*

Discovery by answer — *continued*

- Answer supporting plea, 999
- Anticipated defenses, 720
- Bill based on information and belief, 721
- Corporation, answer by, 722
- Denial of information and belief, 726
- Denial of knowledge, 726
- Effect of incorporation of plea in answer, 1010, 1011, 1012
- Effect of resort to plea, 985-988
- Evasive answer, 723
- Exceptions for insufficiency:
 - Admission of sufficiency of demurrer accompanying answer, 983
 - Affirmative defenses, 774
 - Amendment of exceptions, 778
 - Answer in support of plea, *see supra*, Answer in support of plea
 - Attachment for contempt on sustaining exceptions, 782
 - Costs on sustaining exceptions, 782
 - Decree *pro confesso* on sustaining exceptions, 782
 - Defensive matter not subject to exceptions, 774
 - Demurrer not substituted for, 772
 - Discretion of court as to form, 778
 - Duty to answer over, 782, 783
 - Form of exceptions, 777, 778
 - Foundation for exceptions, 778
 - Function of exceptions, 772, 773
 - Prayer, 777
 - Procedure when exceptions sustained, 782
 - Questions raised by, 772
 - Reference to master, 779, 780
 - Replication not substituted for, 772
 - Replication on overruling exceptions, 781
 - Setting down for hearing, 779
 - Time of filing, 775, 776
 - Unsworn answer, 784, 785, 786, 787
 - Waiver of right to except, 776
 - When exceptions sustainable, 773
- Fullness and explicitness required, 720
- General answer, when sufficient, 725
- General traverse, 741
- Immaterial allegations, 727
- Inconsistent answer, 723
- Negative pregnant, 728
- Noncommittal statements, 723
- Plea in bar, effect of, 729
- Specific interrogatories in bill:
 - Corporation defendant, 737
 - Demurrable interrogatories, 735
 - Duty to answer in general, 730

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

ANSWER — continued

Discovery by answer — continued

- Specific interrogatories in bill — *continued*
 - Form and extent of denial, 731
 - Generally, 724, 730
 - Information and belief, 732
 - Marshaling evidence, 733
 - Necessity to enforce full discovery, 724
 - Refusal to answer, allegation of grounds, 736
 - Trade secrets, discovery of, 734
 - Underwritten note, 738
 - Who must answer, 737
- Surplusage in bill, 727
- Waiver of sworn answer, effect of, 787
- Whole bill to be answered, 719

Distinction between plea and answer, 826

Duty to answer when plea overruled, 885

Election between plea and answer, 887

Evasive answer, where discovery is sought, 723

Evidence:

- Answer as evidence, see **EVIDENCE**

Exceptions to answer:

- Exceptions to legal sufficiency improper, 810

- For insufficiency of discovery, see *supra*, **Discovery by answer**

- For scandal and impertinence, see **SCANDAL AND IMPERTINENCE**

Exhibits, 709

Filing:

- Leave to file out of usual course, 711

- Presumption of regularity, 710

- Time of filing, 710

Formal pleading of defendant, 677

Forms relating to, see FORMS

Fullness and explicitness required:

- Bill based on information and belief, 721

- Corporation defendant, 722

- General rule, 720

Functions, 715, 716, 718

General answer, words sufficient, 725

Guardian *ad litem*, 491

Immaterial allegations not to be answered, 727

Inconsistency as surplusage, 753

Inconsistent answer where discovery is sought, 723

Incorporation of plea or demurrer in answer:

- Affirmative plea, 1011

- Anomalous plea, 1012

- Discovery, effect on, 1010, 1011, 1012

- Equity rule, 1010-1014

- Negative plea, 1012

- Notice of reliance on matter of plea, 1013

- Propriety of practice, 1009

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

ANSWER — continued

Incorporation of plea or demurrer in answer — *continued*

 Rule where separate plea first overruled, 1014

Injunction cases, see INJUNCTIONS

In subidium, 1008

Interrogatories in, 235

Joinder of answer and *plea or demurrer*, 677

Joint and several answer, when proper, 689

Multifariousness, objection by *answer*, 441

Nature and object, 1140

Necessity for, 104, 677

Necessity of answering whole bill, 719

Negative pregnant, 728

Nominal defendant, 687

Oath:

 Affirmation in lieu of oath, 705

 Authentication of official character of officer administering, 704

 Corporation defendant, 702

 Dismissal of bill without prejudice to waive oath, 1094

 Equity rule, 785

 Exceptions to unsworn answer, 784, 785, 786, 787

 General rule as to necessity, 701

 Joint and several answer, 703

 Objection for want of oath, 706

 Order of court dispensing with, 707

 Peer of the realm, 702

 Striking out unsworn answer, 706

 Sworn answer evidence for defendant, 701

 Waiver, see *infra*, Waiver of oath

 Who may administer, 704

Objection by answer for nonjoinder of parties, 516

Order to answer on overruling demurrer, 968

Paragraphic divisions, 696

Parts of bill to which answer responds, 717, 718

Perpetuation of testimony, 1772

Petition, answer to, 1299

Plea and answer setting up different defenses, 980

Plea, answer, and demurrer to same bill, 975, 978

Plea overruled by answer, 974, 981

Plea to jurisdiction not overruled by answer to merits, 981

Prayer, 695

Process to compel, 686

Pro *confesso* for failure to answer, plead, or demur, 1552

Receivership cases:

 Proceedings for interlocutory discharge, 2796

 Weight of answer, 2556

Reservation of exceptions for defects, 692

Responsiveness:

 Admission of allegation of bill, 1606

Eq. Prac. Vol. III.—121.

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2397.)

ANSWER — continued

Responsiveness — continued

- Defense of innocent purchase, 1607
- Denial of material allegation of bill, 1608
- Determination by burden of proof, 1610
- Erroneous view, 1611
- Facts set up in avoidance of case made, 1606
- Illustrations, 1608
- Matter of charge and discharge, 1609
- New matter generally, 1606, 1607
- What constitutes in general, 1606

Revivor of suit:

- Contents, 1220
- Necessity, 1219

Rule that answer overrules plea, 974, 981

Scandal and impertinence, see SCANDAL AND IMPERTINENCE

Signature of counsel, 700

Signature of defendant:

- Attestation of, 697
- Corporation defendant, 699
- Curing want of signature, 697
- Guardian or committee of incompetent, 697
- Leave to file unsigned answer, 698
- Municipal corporation, 699
- Necessity of, 697

Solicitor, power of, 687

Specific interrogatories not necessary to enforce full discovery, 724

Statement of facts in, 104

Striking out:

- For informality generally, 713
- For want of oath, 706

Substance of, 693

Suggestion of want of parties, 754, 755

Suit to enforce or cancel deed, 1020

Superiority of answer to plea or demurrer, 974

Supplemental bill, see SUPPLEMENTAL BILL

Surplusage not to be answered, 727

Taking of answer:

- Commission to take, 684, 685
- Dedimus potestatum*, 685
- Early practice, 684

Terms on allowing after demurrer overruled, 969

Time to answer:

- Determination with reference to rule days, 678, 1206
- Motion to extend time, 681
- Pleading before time expires, 679
- Waiver of failure to answer in time, 680
- When plea overruled, 885

Title, 691

INDEX.

1923

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2285-2897.]

ANSWER — *continued*

- Traverse of matters not expressly admitted, 694
- Vehicle of discovery, 719-729
- Verification, see *supra*, Oath.
- Waiver of defects by answering to merits:
 - Defect in venue, 388
 - Matters available by motion or demurrer generally, 714
- Waiver of oath:
 - By amendment of bill, 1094
 - Effect on answer as evidence, 784
 - Effect on duty to answer fully, 785, 786, 787
 - Equity rule, 701, 708
- Waiver of right to plead by answering, 871
- Who must answer, 687
- Withdrawal by leave of court, 712
- Withdrawal to rely on plea, 982
- Written answer formerly not required, 683

APPEALS:

- Bill of review, see **BILL OF REVIEW**
- Contempt proceedings, see **CONTEMPT**
- Costs, appeals from decrees concerning, see **COSTS**
- Damages on appeal taken for delay, 2203
- Decrees generally, see **DECREE**
- Decrees *pro confesso*, see **TAKING BILL PRO CONFESSO**
- Departure from rule of practice not reversible error, 132
- Injunction cases, see **INJUNCTIONS**
- Intervention proceedings, see **INTERVENTION**
- Issues to jury, see **ISSUES TO JURY**
- Judiciary Act, 1937
- Orders of reference, see **REFERENCE**
- Receivership cases, see **RECEIVERS**
- For appeals in particular proceedings and from particular decrees, orders, etc., see the titles in this Index specifically dealing with such proceedings, decrees, etc.

APPEARANCE:

- Appearance day, 644
- Authority of attorney or solicitor to enter appearance, 641
- Corporation, appearance by attorney, 641
- Corporation, enforcing appearance of, 673, 674
- Day for, 644
- Entry, formal and informal, 640
- Form of, 640
- General appearance:
 - Amendment into special appearance, 656
 - By general demurrer, 647
 - By motion to dismiss on merits, 647

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2294; III, §§ 2295-2897.)

APPEARANCE — continued

General appearance — *continued*

- By request for extension of time, 647
- Defects, waiver by in general, 659
- Definition, 646
- Effect on jurisdiction over subject matter and person, 668
- Limitation to pending suit, 660
- Petition for removal, 649
- Ratification of unauthorized general appearance, 667
- Steps importing, 647
- Steps not importing, 648
- Waiver of defects by, 659
- Waiver of questions raised by former special appearance, 661
- Withdrawal to enter special appearance, 656
- Words of reservation, 646

Infants, 642

Insane persons, 642

Married women, 643

Necessity of, 640

Praecipe for, form of, see FORMS

Process to compel, 663-676

Remedies for failure to appear:

- Attachment for contempt, 664-667, 675, 676
- Commission of rebellion, 667
- Compulsory process, 663-676
- Decree *pro bono/cause*, 663, 673, 674, 1852
- Distringas*, 673
- English practice, 667
- Sequestration, 667-672, 674, 675
- Warrant of arrest, 667

Special appearance:

Definition, 650

English practice, 654

Entry of, 650

Formal special appearance, 651

Form of motion for questioning jurisdiction, 662

General jurisdiction on overruling defendant's contention, 650

Informal special appearance, 652

Leave of court, 655

Local rules determining mode, 655

Motion after special appearance, how far party in court, 650

Motion to dismiss by defendant not served, 648

Operation as general appearance at next term, 648

Person improperly served as defendant, 648

Petition for removal, 649

Privileged persons, 650

Substitution for general appearance, 656

To test question of venue, 390

INDEX.

1925

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

APPEARANCE — *continued*

*Special appearance — *continued**

- Waiver of jurisdiction by subsequent general appearance, 661
- When proper in general, 680
- Time to appear as dependent on rule days, 1268
- Voluntary appearance as conferring jurisdiction, 595
- Waiver of defect of venue by general appearance, 386
- Withdrawal of, 645
- Writing, 640

APPORTIONMENT OF COSTS:

See Costs

ARGUMENT:

- At hearing, *see Hearings*
- Printing, costs of, 1898
- Setting down plea for argument, *see PLEA*

ARGUMENTATIVENESS:

Of plea, 856

ARREST:

Writ of execution of decree, 2212

ASSIGNEES:

Diversity of citizenship in suits by, 346-848

ASSISTANCE, WRIT OF:

- Application for writ, 2222*
- Considerations bearing on issuance, 2223*
- Contents, 2224*
- Direction of writ, 2224*
- Distinguished from writ of possession, 2218*
- Doubtful cases, 2223*
- Equity rules, 2217*
- Federal practice generally, 2217*
- Form of writ, 2224; Appendix, p. 1823*
- In aid of sequestration, 672*
- Lord Bacon's ordinances, 2216*
- Order in lieu of writ, 2225*
- Origin and development, 2216*
- Parties:*
 - Defendants, 2221*
 - English practice, 2219*
 - Equity rule, 2220*
 - Federal practice, 2220*
 - Purchasers, 2219, 2220*
 - Strangers to original suit, 2219-2221*
 - Priority in general, 2215*

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

ATTACHMENT:

Contempt proceedings generally, see CONTEMPT
For disobedience to subpoena, see SUBPOENA, WRIT OF
Petition where property of stranger attached, 1294
Property in hands of receiver, 2602

ATTAIANTED PERSONS:

Capacity to sue, 448

ATTORNEY (see also COUNSEL; SOLICITORS):

Authority to enter appearance, 641
Distinction between attorney and counselor in supreme court, 567
Formal or nominal parties, 535
Lien of, 2061, 2062
Substituted service of process on, see SERVICE OF PROCESS

AVERMENTS:

Jurisdictional, see JURISDICTIONAL AVERMENTS

AWARD:

Plea in bar, 832
Plea to avoid award of arbitrators, 843

BACON, LORD:

Ordinances of, see ORDINANCES OF LORD CHANCELLOR BACON

BANKRUPTCY:

Ancillary proceeding to conserve property, 1228
Capacity of bankrupt to be sued, 484
Jurisdiction in district courts, 3
No asset in bankruptcy proceedings, 2260
Plea in abatement, 830
Referee, 1679
Time for filing bill to review decree, 2144

BAR, PLEA IN:

See PLEA

BETTERMENTS:

Preferential claims in receivership cases, 2744, 2745

BILL:

Accounting under general prayer, 249
Address:
 In English chancery, 163
 In federal court, 165
 In state courts of equity, 164
Admission by allegation of facts, 739

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

BILL—*continued*

Admissions, charges of, 223, 224

Allegations:

- Admissions in answer, when defects cured by, 181
- Ambiguous allegations, construction against pleader, 290
- Certainty, remedy for lack of, 185
- Certainty, when lack of excusable, 180
- Common-law forms, use of, 184
- Condition precedent, performance of, 202
- Construction, principle of in general, 286
- Distinguished from interrogatories, 787
- Estoppel, 213, 214
- Evidence not to be pleaded, 179
- Extraordinary relief, 193
- Facts to be alleged, 176, 177
- Harmonizing allegations, 287
- Insufficient facts and uncertainty distinguished, 182

Interest of parties:

- Defendant, 206, 209
- Demurrer for absence of allegation, 204
- Joint interest of defendants, 435
- Joint interest of plaintiffs, 434
- Plaintiff, 201, 203

Jurisdiction, see JURISDICTIONAL AVERTMENTS

Laches, 210, 211

Legal conclusions, 175

Liability of defendant, 207, 208

Misconduct, 192

Negligence, 192

Personal and intangible rights, certainty required, 196

Relief determined by scope of, 178, 193

Saving equity of bill, 288

Saving jurisdiction of court, 289

Set forms unnecessary, 183

Title, how alleged, 205

Title of plaintiff, necessity of alleging, 201

Amendment of, see AMENDMENT

Anticipating defenses, 841, 844

As evidence, see EVIDENCE

Caption:

- Allegation improper in, 161
- Purpose and form of, 159
- When improper, 160

Cause of action:

Demurrer to new matter, 1091

Manner of introducing, 1090

Certainty of allegations, 180, 185

Certiorari, nature of, 152

{References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2224; III, §§ 2225-2297.]

BILL — *continued*

Charging part:

- Admissions, charges of, 223, 224
- Amendment to meet special defense, 221
- Anticipating defenses in general, 220-221
- Anticipating defenses, mode of, 220
- Confessions, charges of, 223, 224
- Documents, charges of, 225
- Evidence, charges of, 222
- Function of, in general, 220
- Interrogatories, purpose of, 730
- Relation to stating part, 221

Classification in general, 140 *et seq.*

Class suits, 543

Common conspiracy clause, nature and purpose of, 218, 219

Confederating clause, nature and purpose of, 218, 219

Confessions, charges of, 223, 224

Consistency required in stating facts, 258

Construction and interpretation of allegations, 286

Cross bill, see *CROSS BILL*

De bene esse, see *BILL DE BENE ESSERE*

Dependent bill:

- Classification of dependent bills, 144
- Definition, 142
- Illustrations of types, 145, 146
- In nature of original bill, 148
- Property in custody of court, 1246

Discovery, see *DISCOVERY*

Distinguished from information, 137

Documents, charging, 285

Double aspect under prayer for alternative relief, 256

Evidence:

Bill as evidence, see *EVIDENCE*

Charging evidence, 222

Exceptions to, form for, see *FORMS*

Filing:

Commencement of suit by, 580, 581

Effect of submission to jurisdiction, 580

What constitutes, 580

Foreclosure suits, see *FORECLOSURE*

Formal parts in general, 162

Form, simplicity of in general, 158

Forms of bills, see *FORMS*

Fraud, allegations of, see *FRAUD*

Information distinguished from, 137

Initials, use of in naming parties, 169

Injunction bills, see *INJUNCTION*

Interest, allegations of, see *supra*, *Allegations*

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

BILL — *continued*

- Interpleader, see **INTERPLEADER**
- Interpretation and construction of allegations, 286
- Interrogatories:
 - Additional interrogatories, propriety of, 241
 - Answer not to contain, 235
 - Basis on charges of evidence, 239
 - Basis on general charge, 240
 - Distinguished from allegations, 787
 - General interrogatory, form of, 237
 - Kinds of, 236
 - Origin and purpose of, 233
 - Precision necessary, 241
 - Reference to in bill, 238
 - Special interrogatory, nature and form of, 238
 - Specific interrogatories not necessary to enforce full discovery, 724
 - Use confined to equity practice, 234
- Introduction:
 - Christian name, middle name, and surname, 168
 - Citizenship of parties, remedy for failure to state, 306
 - Form of in general, 167
 - Initials, use of in name of parties, 169
 - Mistake in naming party, 178
 - Names of parties, remedy for failure to state, 306
 - Naming married woman, 170
 - Naming parties in general, 168
 - Purpose of, 166
 - Remedy for insufficiency, 306
 - Representative parties, naming, 172
 - Residence of parties, statement of, 171
 - Residence of parties:
 - Remedy for failure to state, 306
- Jurisdiction, averment of, see **JURISDICTIONAL AVERMENTS**
- Jurisdiction clause, necessity of, 232
- Legal conclusions, 175
- Misconduct, allegations of, 192
- Mixed character, 143
- Multifariousness in, see **MULTIFARIOUSNESS AND MISJOINDER**
- Naming parties, see *supra*, Introduction
- Narrative part, importances of, 174
- Necessity for, 104
- Negligence, allegations of, 192
- New cause of action, 1090, 1091
- Oath:
 - Prayer as to, 274, 275
 - Verification, see *infra*, Verification
- Of costs, see **COSTS**
- Of discovery, see **DISCOVERY**

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

BILL — *continued*

Of interpleader, see **INTERPLEADER**

Of relief, see **RELIEF**

Original bill, see **ORIGINAL BILL**

Paragraphing, 298

Perpetuation of testimony, see **PERPETUATION OF TESTIMONY**

Prayer for process:

Minority of defendant, statement of, 273

Names, remedy for failure to state, 306

Naming defendants, 272

Necessity and importance of, 271

No cause, 2270

Oath, requirement of, 274

Oath, waiver of, 275

Remedy for insufficiency, 306

Statement as to disability of defendants, 487

Prayer for relief:

Accounting under general prayer, 249

Alternative prayer:

Conformity of prayer with special relief sought, 256

Criterion of right to prayer, 259

Discretion of court as to granting, 265-267

Effect of multifariousness, 264

For secondary relief, 263

Foundation on successive equities, 262

Right as affected by parties, 269, 270

Scope of prayer, 255

Underlying principles in general, 254

Conformity of relief to case made in bill, 247, 248, 1941

Consistency of facts and prayers, 261

Cumulative grounds of action, 260

General prayer:

Relief grantable in suit for specific performance, 251

Relief grantable under in general, 246

Relief where bill charges fraud, 252, 253

Use to effectuate relief sought in special prayer, 250

When sufficient in general, 243

Inconsistency, effect of, 258

Kinds of, 242

Special demurrer to prayer for extraordinary relief, 950

Special prayer:

Scope and effect of, 245

When sufficient, 244

Premises, importance of, 174

Process, prayer for, see *supra*, Prayer for process

Pro confesso, see **TAKING BILL PRO CONFESO**

Quieting title, see **QUIETING TITLE**

Receivership cases, see **RECEIVERS**

INDEX.

1931

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

BILL — continued

- Reformation, see REFORMATION
- Relief, bill of, see RELIEF
- Relief, prayer for, see *supra*, Prayer for relief
- Review, bill of, see BILL OF REVIEW
- Revivor, bill of, see BILL OF REVIVOR
- Signature of counsel:
 - Necessity for, 299
 - Objection for want of signature, 301
 - Place of signing, 300
 - Remedy for want of, 306
- Signature of plaintiff:
 - Necessity of, 302
- Special defense, amendment to meet, 231
- Statement of facts in, 104
- Stating part, importance of, 174
- Striking bill from files, 306
- Supplemental bill, see SUPPLEMENTAL BILL
- To effectuate decree, see BILL TO EFFECTUATE DECREE
- To impeach decree, see BILL TO IMPEACH DECREE
- To perpetuate testimony, see PERPETUATION OF TESTIMONY
- Verification:
 - Necessity of, 304
 - Remedy for want of, 306
 - What bills require verification, 305
 - Who may make, 304

BILL DE BENE ESSE:

- Affidavit in support of, 1790
- Allegations, 1790
- Auxiliary bill, 1789
- Bill to perpetuate testimony, see PERPETUATION OF TESTIMONY
- Deposition *de bene esse*, see DEPOSITION
- Original bill, 155
- Propriety of, 1789
- Purpose, 1789
- Qualification, 1790
- Resemblance to bill to perpetuate testimony, 1789
- Use in aid of litigation pending in another court, 1789, 1791
- Verification of, 305

BILL OF DISCOVERY:

See DISCOVERY

BILL OF EXCHANGE:

Proof of, as exhibit, 1621

BILL OF INTERPLEADER:

See INTERPLEADER

{References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2807.]

BILL OF RELIEF:

See **RELIEF**

BILL OF REVIEW:

Abandonment of appeal as affecting right to maintain, 2146

Affidavit on petition for leave to file, 2162

Ancillary proceeding, 1240

Appeals:

Application to appellate court, 2181

Diligence in regard to new evidence, 2183

Leave at instance of party not appealing, 2180

Leave of appellate court to review decree, 2179

Materiality of new evidence, 2183

Order of appellate court granting leave, 2182

Review of decree rendered by appellate court, 2178

Second application for leave to review, 2184

Bill of review, supplement, and revivor, 2125

Clerical error, 2134

Consent decree, 2138

Contents:

Generally, 2173

Supplemental bill in nature of bill of review, 2176

Costs:

Security for costs, 2168

Stay of proceedings pending payment, 2172

Court in which bill maintainable, 2121

Decree based on forgery, 2149

Decree contrary to law, 2132, 2136

Decree unjustified by original bill, 2133

Default decree, 2148

Definition, 146

Demurrer for failure to aver performance, 2171

Discretion of court:

New or newly discovered evidence, 2157

Passing on merits, 2127

Review of discretion, 2159

Suspension of decree pending review, 2128

Effect of adjudication, 2177

Error apparent:

Analogy to writ of error, 2130

Change in ruling by appellate court, 2136

Clerical error, 2134

Consent decree, 2138

Decree contrary to law, 2132, 2136

Decree irregularly entered, 2133

Decree unjustified by reasonable bill, 2133

Errors reviewable, 2130

Irregularities not affecting merits, 2134

INDEX.

1958

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

BILL OF REVIEW—continued

Error apparent—continued

- Leave of court, 2141-2143
- Matters previously reheard, 2139
- Matters waived, 2138
- Meaning of term, 2130
- Nonjoinder of proper parties, 2135
- Ruling of state court and state statute, 2137
- Scope of review, 2140
- Time for review, 2144, 2147
- Want of jurisdiction, 2131

Filing, see *infra*, Time for filing

Final or interlocutory decree, 2120

Grounds:

- Change of ruling by higher court, 2136
- Defect of parties, 2135
- Error apparent, see *supra*, Error apparent
- Joiner of different grounds, 2175
- Lord Bacon's Ordinances, 2119
- Necessity of setting forth grounds, 2119
- New or newly discovered evidence, see *infra*, New or newly discovered evidence
- Want of proper service, 2133

Injunction against enforcement of decree, 2128

Irregularities not affecting merits, 2134

Jurisdiction:

- Court in which bill maintainable, 2121
- Review for want of jurisdiction, 2131

Leave of court:

- Affidavit accompanying petition, 2160
- Answer to petition, 2162
- Appealed cases, 2141
- Appellate court, 2179, 2180
- Draft of proposed bill accompanying petition, 2161
- Effect of granting leave, 2142
- Laches, 2154
- Leave at instance of party not appealing, 2180
- Necessity in general, 2141, 2142
- Negligence, 2154
- New or newly discovered evidence, 2157-2162
- Petition for leave to file, 2160, 2161
- Presumption as to diligence, 2167
- Presumption as to granting of leave, 2158
- Review of court's discretion, 2159

Lord Bacon's Ordinances, 2118, 2119, 2160

Matters waived, 2138

New or newly discovered evidence:

- Cogency and weight of evidence, 2151
- Cumulative oral testimony, 2152

INDEX.

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.)

BILL OF REVIEW — *continued***New or newly discovered evidence — *continued***

- Diligence as affecting right, 2163, 2166, 2167
- Documentary evidence, 2153
- Evidence to impeach former witnesses, 2154
- Excuse for failure to search for evidence, 2165
- Forgery, 2149
- Fraud, 2149
- Generally, 2148
- Laches, 2164
- Leave of court, 2157-2159
- Lord Bacon's Ordinances, 2160
- Matters not in issue in prior suit, 2155
- Negligence, 2164
- Performance of prior decree, 2169-2173
- Petition for leave to file, 2160-2162
- Power of appellate court to determine diligence, 2183
- Power of appellate court to determine materiality, 2183
- Presumption as to diligence, 2167
- Rehearing instead of bill of review, 2150
- Remand by appellate court, 2179
- Requisites of new evidence in general, 2150
- Time for filing bill, 2166

Origin of review by bill, 2118**Parties:**

- Assignee of party's interest, 2123
- Determination of question on facts of case, 2126
- Necessary and unnecessary parties, 2126
- Parties and privies to original suit, 2123
- Persons aggrieved, 2122
- Representative parties, 2123
- Who may maintain generally, 2122

Performance of prior decree:

- Demurrer for failure to aver performance, 2171
 - Excuse for amount of performance, 2170
 - Showing performance, 2169
- Petition for leave to file, 2160, 2161
- Petition to rehear treated as informal bill of review, 2174
- Presumption as to diligence in gathering evidence, 2167
- Pure bill, 2129
- Receivership pending bill, 2128
- Rehearing as bar to, 2139
- Rehearing instead of, 2150
- Ruling of state court under state statute, 2137
- Scope of review for error apparent, 2140
- Second application for leave to review, 2184
- Security for costs and damages, 2168
- Supplemental bill in nature of bill of review, 2124, 2150, 2176
- Suspension of decree pending review, 2128

INDEX.

1935

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

BILL OF REVIEW — *continued*

Time for filing:

- Analogy to time for appealing, 2143
- Bill based on newly discovered evidence, 2156
- Decree in bankruptcy, 2144
- Effect of abandonment of appeal, 2146
- Equity rule, 2117
- Error apparent, 2143
- Extension of time, 2145
- Generally, 2117
- Laches, 2156
- New or newly discovered evidence, 2150, 2156
- Objection for filing out of time, 2147

Who may maintain, 2122, 2123

BILL OF REVIVOR (see also Revivor):

- Admission by failure to plead or answer, 1219
- Alternative proceedings, 1226, 1227
- Amendments, 1218
- Ancillary proceeding, 1202, 1239
- Answer to bill:
 - Contents, 1220
 - Necessity, 1219
- Bill in nature of bill of revivor:
 - Equity rule, 1214
 - Privity required, 1210
 - Right resulting from act of predecessor himself, 1210
 - Suit against successor of corporation, 1211
- Bill of review, supplement, and revivor, 2125
- Bill of revivor and supplement, 1212
- Comparison with simple supplemental bill, 1202
- Conformity to original bill, 1218
- Contents, 1218
- Decrees:
 - Bill to carry decree into effect, 1225
 - Bill to revive decree, 1224
- Definiteness and certainty, 1218
- Effect of sustaining, 1221
- Equity rule, 1214
- Introduction of new cause of action, 1090
- Jurisdiction, 1202, 1239
- Laches, 1215
- Leave of court, 1215
- Nature of proceeding generally, 1202-1211
- Necessity in general, 1202
- Order to revive, 1213
- Order to show cause, 1214
- Parties:
 - Administrator, 1212

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2997.]

BILL OF REVIVOR — continued

Parties — continued

Bill to revive decree, 1224

Executor, 1212

Heirs, 1212

Successor in interest, 1212

Patent infringement cases, 1204

Plea to bill, 1219

Privity:

Bill in nature of bill of revivor, 1210

Bill of revivor proper, 1209

Propriety of:

Purpose of original bill fully accomplished, 1216

Question of costs, 1217

Purpose of, 145

Setting out original bill and proceedings, 1218

Striking out bill improperly filed, 1215

Subpoena, 611

Suit against successor of corporation, 1211

Supplemental bill distinguished from bill of revivor, 1161

Time of filing, 1213, 1215, 1223

BILL TO CONSTRUE DECREE:

Ancillary proceeding, 1243

BILL TO EFFECTUATE DECREE:

Ancillary proceeding, 1243, 2231

Bill by transferee of property, 2229

Decree in another court, 2232

Discovery in aid of prior decree, 2230

Discretion of court as to granting relief, 2233

Forms relating to, see FORMS

Imposition of terms, 2233

Jurisdiction, 1243

Matters available, 2228

Nature, 2226

Original bill, 2232

Power of court to entertain, 2227

Renewal of decree about to be barred, 2231

Supplemental bill in aid of decree, 2228

Want of jurisdiction in prior suit, 2234

BILL TO IMPEACH DECREE:

Accident or mistake:

Bill in nature of bill of review, 2193

Freedom from negligence, 2194

Necessity of good defense, 2194

Original bill, 2193

Requisites of bill, 2194

Time for filing, 2195

INDEX.

1987

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2834; III, §§ 2235-2897.]

BILL TO IMPEACH DECREE—*continued*

Comparison with rehearing and bill of review, 2185

Fraud:

Analogy to bill of review, 2185

Bill in nature of bill of review, 2186

Effect of sustaining bill, 2192

Grounds justifying maintenance of suit, 2189

Inherent power of court, 2185

Laches as affecting right, 2191

Leave of court, 2186, 2187

Original bill, 2185

Original bill by stranger to prior suit, 2187

Relief in federal court against decree of state court, 2188

Restoration of *status quo*, 2192

Sufficiency of fraud, 2190

Mistake, see *supra*, Accident or mistake

BILL TO PERPETUATE TESTIMONY:

See **PERPETUATION OF TESTIMONY**

BONA FIDE PURCHASE:

Answer setting up *bona fide* purchase, 859

Defense of innocent purchase in foreclosure suit, 2852

Innocent purchase as plea in bar, 832

Nature of defense, 858

Plea controverting innocent purchase, 843

Plea, nature and requisites of, 857, 858

BOND:

For costs, see **SECURITY FOR COSTS**

Forms relating to, see **FORMS**

Injunction, see **INJUNCTIONS**

Proof of bonds as exhibits, 1621

Receivership cases, see **RECEIVERS**

BONDHOLDERS:

As parties, 512

BREACH OF CONTRACT:

See **CONTRACT**

BRIEFS:

Preparation for final hearing, 1906

Printing, costs of, 1989

BURDEN OF PROOF:

Citizenship, 335

Contempt proceedings, 2478

Eq. Prac. Vol. III.—122.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

BURDEN OF PROOF — continued

- Dissolution or modification of injunction, 2399
- Responsiveness of answer as determined by, 1610
- Trial on plea and replication, 896

CALENDAR:

- Advancing cause on calendar, 1903, 1904
- Placing cause on calendar for hearing, 1902

CAPACITY TO SUE:

See **PARTIES**

CAPTION:

- Answer, 691
- Bill, 159-161
- Cross-bill, 1054
- Deposition, 1800

CERTAINTY:

See **DEFINITENESS AND CERTAINTY**

CERTIFICATE:

- Certification of exhibit, 1808, 1809
- Demurrer, certificate of counsel to, 937, 954-956
- Forms of, see **FORMS**
- Receivers' certificate, see **RECEIVERS**
- To depositions, see **DEPOSITIONS**
- To plea, 868

CERTIORARI, BILL OF:

Nature, 152

CESTUI QUE TRUST:

When necessary party, 512

CHAMBERS:

- Injunctions at chambers, see **INJUNCTION**
- Interlocutory orders grantable at chambers, see **INTERLOCUTORY PROCEDURES**

CHANCERY:

See **EQUITY**

CHARGING PART:

See **BILL**

CIRCUIT COURT:

- Appointment of examiners by, 1667
- Equity jurisdiction, origin of, 2

INDEX.

1939

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

CIRCUIT COURT — *continued*

- Jurisdiction where federal question involved, 321
- Principal court of equity, 4
- Rules, power to make, 114, 115

CITIZENSHIP:

- Burden of proof, 335
- Corporations, whether included in term citizen, 337, 338
- Demurrer where jurisdiction depends on citizenship, 933
- Dismissal for exemption from suit, by reason of, 522
- Diverse, see DIVERSITY OF CITIZENSHIP
- Relation back of amendment averring citizenship, 1103

CLASS SUITS:

- Bill, form of, 543
- Decree:
 - Conclusiveness on absent parties, 549, 551, 552
 - Effect of decree under English practice, 549
 - Effect of equity rules, 550
 - Practice of federal courts, 551
 - Spurious class suits, 552
- Injunction to restrain strike, 548
- Interest necessary for representative of class, 544
- Not maintainable where defendants have separate interest, 542
- Parties to, see PARTIES
- Spurious class suit founded on personal liability, 548
- Suits to restrain strikes, 548
- True class suit concerns property, 547

CLERK OF COURT (see also INTERLOCUTORY PROCEEDINGS)

- Duties and functions generally, 1262

COMITY:

- As affecting jurisdiction, 25

COMMENCEMENT OF SUIT:

- Filing of bill, 580, 581
- Service of process, when necessary, 582

COMMISSION:

- Deposition on commission and interrogatories, see DEPOSITIONS

COMMISSIONER:

- Power to punish for contempt, 2449

COMMISSION OF REBELLION:

- Process to enforce appearance, 667
- Writ of execution of decree, 2212

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2224; III, §§ 2225-2907.]

COMMITTEE:

Suit by in behalf of insane person, 480, 481

COMMON CONSPIRACY CLAUSE:

Nature and purpose, 218, 219

COMPETENCY OF WITNESSES:

See **WITNESSES**

CONCLUSIONS OF LAW:

See **LEGAL CONCLUSIONS**

CONDITIONS PRECEDENT:

Foreclosure cases, see **FORECLOSURE**

CONFEDERATING CLAUSE:

Nature and purpose of, 218, 219

CONFessions:

Charging, 223, 224

Rehearing to admit evidence of confessions, 2101

CONFORMITY:

Of federal to state practice, 9

CONGRESS:

Acts of Congress regulating practice, 107

Control of separation of law and equity, 11

CONSENT:

Admission of necessary party by, 518

Consent decrees, see **DECREE**

CONSIDERATION:

Alleging consideration, certainty required, 197

CONSOLIDATION OF CAUSES:

Against objection, 1311

Ancillary and principal suits, 1313

Bills seeking antagonistic relief, 1312

Cause removed from state court, 1311

Considerations bearing on right generally, 1312

Creditors' bill and foreclosure suit, 1313

Decree, 1316

Discretion of court, 1312, 1316

Dismissal, effect of consolidation on right of, 1316

Effect of consolidation generally, 1316

Effect on jurisdiction dependent on diverse citizenship, 1313

INDEX.

1941

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

CONSOLIDATION OF CAUSES—*continued*

- Evidence, effect on rights regarding, 1516
- Federal courts generally, 1811
- Foreclosure suits, 2837
- Foreclosure suit and creditors' bill, 1312
- Interests diverse, 1312
- Parties different, 1312
- Patent infringement suits, 1314
- Principal and ancillary suits, 1313
- Separate decrees or judgments, 1316
- Stage of proceedings at which allowed, 1315
- Statute in regard to, 1311

CONSPIRACY:

- Charging specially, 219
- General demurrer to bill charging conspiracy not favored, 965
- Multifariousness where conspiracy to defraud alleged, 416

CONTEMPT:

- Affidavit:**
 - Affidavit and rule to show cause, 2462
 - Defense by affidavit, 2473-2475
 - On motion or petition to commit, 2463, 2469
- Answer:**
 - Defense by answer generally, 2373, 2374
 - Weight of answer at law, 2479
 - Weight of answer in equity, 2480
- Appeal:**
 - Disposition of fines on appeal, 2500
 - Review of decision imposing fine, 2496, 2499
- Attachment of person:**
 - Alias writ, 667
 - Bail, 676
 - Custody of defendant, 675
 - Discretion in issuing, 664
 - Execution, 668
 - Form of writ, 665
 - Pluries writ, 667
 - Return day, 665
 - Return to writ, 666, 675
- Commissioner, power to inflict punishment, 2449
- Corporation defendant, 2494
- Costs:**
 - Defendant not guilty of bad faith, 2502
 - Misunderstanding of order or decree by party, 2485
 - Reference unsuccessfully prosecuted, 2477
- Damages:**
 - Compensatory damages, 2502
 - Nominal damages, 2501

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

CONTEMPT—*continued*

- Decree, see *infra*, Order or decree
- Defense to proceedings:
 - Advice of counsel, 2503
 - Affidavit in defense, 2473, 2475
 - Answer in defense, 2473
 - Collateral attack on jurisdiction, 2490
 - Depositions, 2475
 - Dismissal of cause on merits, 2484
 - Inequity of injunction, 2487
 - Instructions of superior, 2486
 - Intent of defendant, 2488
 - Irregularity or impropriety of injunction, 2483
 - Manner of defending generally, 2373
 - Misunderstanding of decree, 2485
 - Mitigating circumstances generally, 2503
 - Mode of proof generally, 2475
 - Sufficiency of defense, 2474
 - Want of jurisdiction, 2489
- Depositions, taking evidence by, 2475
- Direct contempt, summary proceedings to punish, 2461
- Discovery, right of plaintiff to, 2476
- Discretion of court as to fine, 2499
- Disobedience of subpoena:
 - Attachment, see *supra*, Attachment of person
 - Punishment for, 676
- Due process of law, 2451
- Enforcement of decrees:
 - Equity rule, 2214
 - Orders for payment of money, 2204
 - Ordinary debts, 2206
 - Situations justifying contempt proceedings, 2205
 - Writ of execution of decree, 2209, 2215
- Entitling proceedings, 2470
- Evidence:
 - Affidavits, see *supra*, Affidavit
 - Answer, 2479, 2480
 - Burden and quantum of proof, 2478
 - Depositions, 2475
 - Oral evidence, 2475
 - Pretermission of questions to final hearing, 2481
 - Right to discovery, 2476
 - Weight of defendant's answer, 2479, 2480
- Failure to answer over when exceptions sustained, 782
- Fine:
 - Amount of compensatory fine, 2497, 2499
 - Compensation of injured party, 2495, 2497
 - Corporation defendant, 2494

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

CONTEMPT — *continued*

Fine — *continued*

- Criminal and civil elements, 2495
- Disposition of compensatory fine, 2498
- Disposition of fines on appeal, 2500
- Power to fine, 2493
- Purpose of fine, 2495
- Review of decision, 2496
- Voluntary association defendant, 2494

Imprisonment, power to impose, 2493

Indirect contempt:

- Affidavit and rule to show cause, 2462
- Affidavit on motion to commit, 2463
- English chancery practice, 2484

Injunctions:

- Disobedience of injunction granted by state court, 2450
- Elements involved, 2458
- Inequity of injunction, 2487
- Irregularity or impropriety of injunction, 2483
- Necessity of notice of injunction, 2453
- Necessity of privity with defendant, 2460
- New matter justifying modification of injunction, 2487
- Persons included in injunction order, 2459
- Persons punishable generally, 2456
- Recitals of order or decree adjudging contempt, 2491
- Specific acts constituting violation of injunction, 2482
- Strangers to suit, 2457-2460
- Sufficiency of injunctive order as affecting charge, 2454
- Technicality of pleadings unnecessary, 2488
- Violation of injunction as contempt, 2452
- Who may institute proceedings, 2455

Intention as affecting guilt, 2488

Interference with possession of receiver, 2597, 2598

Interference with sequestrators, 672

Jurisdiction:

- Collateral attack on jurisdiction, 2490
- Court against which offense committed, 2450
- Disobedience of injunction granted by state court, 2450
- Mandate from appellate court, 2450
- Want of jurisdiction as defense, 2489

Jury trial, 2451

Motion by persons in contempt, 1277

Motion or petition to commit:

- Affidavit in support of motion, 2463, 2469
- Contempts generally, 2471
- Indirect contempt generally, 2463
- Notice of motion, 2466
- Time of motion, 2465
- Waiver of notice, 2467

INDEX.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

CONTEMPT — *continued*

- Nature of offense, 2444
- Newspaper comments on trial, 2447
- Notice of motion to attach, 2466, 2467
- Obstruction of justice, 2448
- Order or decree:
 - Additional penalty, 2493
 - Alternative penalty, 2493
 - Decree *pro confesso*, 1553
 - Recitals where injunction violated, 2491
 - Review of decision imposing fine, 2496

Parties:

- Effect of equity rule 48, 2457
- Procedure against person not party to original suit, 2472
- Who may institute proceedings, 2455

Petition to commit, see *supra*, Motion or petition to commit
Proceedings before examiner generally, 1685

Punishment:

- Authority of President to pardon and remit, 2504
- Control of court over, 2504
- Damages, 2501, 2502
- Fine, see *supra*, Fine
- Imprisonment, 2493
- Independent crime, 2449
- Nature and limits of power to punish, 2445
- Newspaper comments on trial, 2447
- Obstruction of justice, 2448
- Power of offended court, 2450
- Power to impose fine or imprisonment, 2493
- Statute concerning punishment, 2446, 2447
- Suspension of punishment, 2492

Receivership proceedings:

- Committal of receiver for disobedience to order, 2735
- Interference with receiver's possession, 2597, 2598
- Suit against receiver without leave, 2676

References:

- Right to order reference to master, 2477
- Refusal to answer before examiner, 1677, 1685

Rule to show cause:

- Indirect contempts generally, 2462
- Statutes concerning punishment, 2446-2448
- Summary proceedings on direct contempt, 2461
- Technicality of pleadings unnecessary, 2468
- Voluntary association, 2494

CONTINUANCE:

- Absence of material witnesses, 1318
- Absence of plaintiff, 1318

INDEX.

1945

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

CONTINUANCE — *continued*

- Affidavit in support of application, 1317, 1819
- Another suit pending, 1320
- Application, manner of making, 1317
- Counter-affidavits, 1319
- Discretion of court, 1317, 1318
- Hearing of motions, 1287
- Motion for, 1317
- Necessity of, 1318
- Review of decision, 1317
- State statutes, interpretation of, 1320
- Supplemental affidavits, 1319
- Vacancy in office of judge, 1321

CONTRACT:

- Ancillary contract, multifariousness in suit on, 410
- Breach of contract, jurisdiction of equity, 51, 52, 53
- Disposition of existing contracts by receivers:
 - Adoption of contract by receiver, 2641
 - Claim for prior tort or breach of contract, 2644
 - Consequences of doctrine that receiver not bound, 2640
 - Discretion of court as to adoption of contract, 2641
 - Petition for specific performance, 2642, 2643
 - Prior judgment, 2644
 - Receiver not bound by prior executory contract, 2639
- Fraudulent contracts, jurisdiction of equity, 37
- Illegal contracts, jurisdiction of equity, 37
- Usurious contracts, jurisdiction of equity, 37

COPYRIGHT:

- Forms relating to, see FORMS
- Multifariousness in suits relating to, 423, 424

CORPORATION:

- Appearance by attorney, 641
- Answer by, 688
- Appearance by, authority of attorney, 641
- Diversity of citizenship in suits concerning, see DIVERSITY OF CITIZENSHIP
- Capacity to sue, 447, 468
- Contempt proceedings, 2494
- Corporate existence, plea in abatement for want of, 830
- Discovery from, 1873-1875
- Enforcing appearance of, 673, 674
- Foreign, alleging alienage of, 351
- Injunction operative against corporation officers, 2376
- Officer of corporation as party to cross bill, 1049
- Receivership:
 - Effect on corporate existence and liability, 2767
 - Effect on election of officers, 2568

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2997.]

CORPORATION — *continued*

- Service of subpoena on, 599, 600
- Supplemental bill to bring in successor, 1177
- Verification of plea by, 865

CORRECTION OF DECREE:

See **DECREE**

COSTS:

Administrators, see *infra*, Persons acting in representative capacity

Affidavits:

- Contesting charges in bill of costs, 2053
- Verifying costs and disbursements, 2062

Amendment, costs on, see **AMENDMENT**

Amount and items, statute fixing, 1987

Amount in controversy not affected by, 363

Amount of recovery as affecting right, 2012-2015

Appeals:

- Appeal from order after remand, 2060
- Decision of taxing officer, 2056
- Questions of statutory right, 2059
- Right of appeal generally, 2058
- Taxation *nunc pro tunc* in appellate court, 2057

Apportionment between parties:

- Apportionment incident to taking evidence, 2025
- Conduct of both parties reprehensible, 2022
- Demurrer sustained and party overruled in part, 2023
- Denial because of state of record, 2027
- Instruction of order for apportionment, 2028
- Joint items not chargeable separately, 2024
- Leaving apportionment for court below, 2027
- New and important questions, 2022
- Parties equally innocent of wrong, 2022
- Plaintiff partially successful, 2024
- Proceeding beneficial to both parties, 2023
- Reference ordered on motion by both parties, 2023
- Revision at particular period of suit, 2024
- Set-off of apportioned costs, 2029, 2030
- Taxation against fund, 2026

Between party and party:

- Federal practice, 2040
- Nature and rules for taxation, 2033

Between solicitor and client:

- Equity or right, 2036
- Extent of right to costs out of client's fund, 2038
- Fund out of which payable, 2037
- Modes of taxation in federal practice, 2040
- Nature and rules for taxation, 2034

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.)

COSTS — *continued*

- Between solicitor and client — *continued*
 - Order for taxation, 2039
 - Personal representatives, 2035
- Bill of costs, 2050, 1051
- Bill of review:
 - Stay of proceedings pending payment, 2172
 - Security for costs, 2168
- Bill to redeem, 2003
- Contempt proceedings, see **CONTEMPT**
- Demurrer overruled, 969
- Disbursements:
 - Affidavit verifying, 2052
 - Memorandum of, 2050
- Disclaimer, effect of, 2001, 2007
- Discretion of court:
 - Admiralty cases, 2058
 - General principle, 1994
 - Review on appeal, 2058
 - Rules of exercise, 1996
 - Scope of discretion, 1995
- Dismissal of bill:
 - Demurrable bill, 2018
 - For want of bond for costs, 1344
 - For want of jurisdiction, 2019
 - Statute, 2020
 - Taxation against defendant, 2017
 - Taxation against plaintiff, 2016
 - Voluntary dismissal, 1326, 1340, 2016
- Division of court, effect of, 2032
- Docket fee, 1990
- Equity rules, 1988
- Exceptions to taxation, 2055
- Fiduciaries, see *infra*, Persons acting in representative capacity; Reimbursement of representative parties
- Final costs, definition of, 1993
- Foreclosure proceedings, 2047, 2885
- Interlocutory costs, definition of, 1993
 - Interpleader, 2251-2254
- Joint or separate answers, 2031
- Liability for costs:
 - Joint or separate answers, 2031
 - Representative parties, 1997
 - Successful plaintiff, 2002-2005
 - United States, 1991
- Memorandum of costs and disbursements, 2050
- Motion to retax, 2065
- On amendment when demurrer sustained, 966, 1118

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

COSTS — *continued*

- On overruling plea, 886
- On re-examination of witnesses, 1762
- On sustaining exceptions to answer, 782
- Parties:
 - Costs between party and party, see *supra*, Between party and party
- Persons acting in representative capacity:
 - Costs between solicitor and client, 2035
 - Liability for costs, 1997
 - Reimbursement, see *infra*, Reimbursement of representative parties
- Power to award:
 - Against United States, 1991
 - Early statutes allowing costs in equity causes, 1982, 1986
 - Early statutes giving costs in actions at law, 1981
 - Effect of state practice, 1985, 1986
 - Federal courts generally, 1984
 - Generally, 1980-1992
 - Inherent power in equity court, 1983
 - Judiciary Act, 1984
 - Origin of power, 1980
 - Practice of federal courts independent of statute, 1986
 - Proving evidence, arguments, and briefs, 1989
- Receivership cases, 2041, 2737
- Re-examination of witnesses, 1762
- Reimbursement of representative parties:
 - Administrators, 2041
 - Agents, 2041
 - Compensation chargeable to trust estate, 2042
 - Costs caused by misconduct of trustee, 2045
 - Executors, 2041
 - Expenses chargeable to trust estate, 2042, 2043
 - Expenses of party recovering common fund, 2046-2048
 - Fund out of which costs payable, 2044
 - General rule, 1997, 2041
 - Interveners in railroad foreclosure, 2047
 - Necessity for fund in court, 2043
 - Plaintiff claiming adversely to trust, 2048
 - Receivers, 2041
 - Trustees, 2041, 2047
- Removal of causes, 1992, 2021
- Representatives, see *supra*, Persons acting in representative capacity
- Right to recover:
 - Amount of recovery as affecting plaintiff's right, 2012-2015
 - Bill to redeem, 2003
 - Disclaimer as affecting right, 2001, 2007
 - Dismissal of bill, 2016-2021
 - General rule, 1998
 - Imposition of costs on successful plaintiff, 2002-2005

INDEX.

1949

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2384; III, §§ 2385-3397.]

COSTS — *continued*

 Right to recover — *continued*

- Joint or separate answers, 2081
- Suit brought for plaintiff's security or relief, 2004
- Suits for infringement of patent or trademark, 2000
- Suits involving title to realty, 1999
- Tender as affecting right, 2008-2011
- Unnecessary suits, 2005

 Rules of court, 1988

 Security for, see SECURITY FOR COSTS

 Set-off:

- Apportioned costs, 2029
- Costs accruing in other court, 2030
- Solicitor and client, see *supra*, Between solicitor and client
- Stage of suit at which costs may be adjudged, 1993
- Statute of Gloucester, 1981
- Statute of Marlborough, 1981
- Statutory fees and costs in federal courts, 1987
- Stenographer's fees on accounting before master, 1987
- Suit against United States, 480
- Suit brought for plaintiff's security or relief, 2004
- Suits involving title to realty, 1999

 Taxation:

- Affidavit verifying charges in bill and costs, 2053
- Affidavit verifying costs and disbursements, 2052
- Appellate court, 2057
- Bill of costs, 2050, 2051
- By whom costs to be taxed, 2049
- Memorandum of costs and disbursements, 2050
- Nunc pro tunc*, 2057

 Review:

- Appeal, 2056
- English practice, 2054
- Exceptions to taxation, 2055
- Federal practice, 2055
- Motion to retax, 2055

 Taxing officer, 2049

 Tender:

- Effect of tender on liability generally, 2008
- Excuse for failure to tender exact sum, 2011
- Payment into court, 2010
- Requisites of tender, 2009

 Trustees, 2041, 2047

 Unnecessary evidence, 2006

 Unnecessary suit, 2005

COUNSEL (see also ATTORNEY; SOLICITOR):

 Certificate to plea, 868

 Distinction between attorney and counselor in supreme court, 567

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

COUNSEL—continued

- Distinction between solicitor and counsel in federal practice, 566
- Employment of counsel by receiver, 2631-2633
- Fees in receivership cases, 2726-2728, 2737
- Function under English practice, 566
- Officer of court 571
- Right to appear at hearing, 1907
- Signature of answer by, 700
- Signature to plea, 868
- Substituted service of process on, see **Process**

COUNTERCLAIM:

- As defense at law affecting equity jurisdiction, 84
- Intervener in receivership case, 2573

COUETS:

- Circuit court, see **CIRCUIT COURT**
- District court, see **DISTRICT COURT**
- Jurisdiction of, see **JURISDICTION**
- Rules of, see **EQUITY RULES OF SUPREME COURT; RULES OF COURT**
- Separation of law and equity, see **SEPARATION OF LAW AND EQUITY**
- State court, interference of with jurisdiction of federal court, 26
- Supreme Court, see **SUPREME COURT**

COVERTURE:

- See **MARRIED WOMEN**

CREDITORS' BILL:

- Admissions in answer, effect of, 69
- Consolidation of foreclosure suit and creditor's bill, 1313
- Dismissal without prejudice for want of prior judgment, 1347
- Interpleader in creditor's suit, 2256
- Jurisdiction, 68, 69
- Multifariousness, 415, 417
- Parties by representation, 541
- Prior judgment at law, necessity of, 66
- Proving claims before master, 1386, 1388
- State statutes, effect of, 67, 68
- Supplemental bill to show jurisdictional amount, 1163

CROSS BILL:

- Analogy to original bill, 1015
- Ancillary proceeding, 1234
- Answer:
 - Answer and cross bill combined, 1054
 - Cross bill taken as answer, 1022
 - Duty to answer dependent on answering original bill, 1087
- Caption, 1054

INDEX.

1951

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.)

CROSS BILL—*continued*

Cause of equitable cognizance:

- Cross bill in nature of original bill, 1041
- Cross plaintiff not restricted to equitable relief, 1042
- Germane cross bill, 1040
- Remedy at law, 1040

Contents generally, 1055

Cross bill in nature of original bill:

- Conformity of practice to that on original bill, 1039
 - Cross bill bringing in new party, 1051
 - Definition and distinctions, 1037, 1038
 - Necessity to show cause of equitable cognizance, 1041
 - Objections on appeal, 1038
 - Purported cross bill not entirely germane, 1037
 - Restrictions and limitations, 1038
- Defenses available by answer, 1022
- Definiteness and certainty required, 1024
- Definition, 146, 1016
- Demurrer to, 917, 1022, 1037
- Discovery by, 1016, 1018, 1868
- Dismissal where cross bill filed, 1335-1338
- Distinct pleading, 1054
- Election between cross bill and original proceeding, 1021

Filing:

- Abuse of leave to file, 1064
- Court in which cross bill to be filed, 1058

Final filing:

- Discretion of court, 1060
- Filing after hearing on merits, 1062
- Filing after publication of testimony, 1061
- Filing after replication, 1059
- Filing with or after answer, 1059

Leave to file, 1063

Right to file without leave, 1059

Foreclosure suit, 1034

Form of, see FORMS

Hearing and disposition:

- Dismissal of cross bill on dismissal of original bill, 1073
- Dismissal on sustaining demurrer, 1070
- Final disposition of bill and cross bill, 1071
- Principles of adjudication, 1070
- Relief on cross bill after dismissal of original bill, 1072
- Setting down for hearing, 1069, 1904

Interpleader, cross bill in, 2249, 2250

Jurisdiction:

- Amount in controversy, 1234
- Court having jurisdiction of original bill, 1058, 1235
- Diversity of citizenship, 1234

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2357.]

CROSS BILL — continued

Liens, enforcement of or relief from, 1032

Mortgages:

Bill to relieve from mortgage, 1032

Form of cross bill for foreclosure, see **Forms**

Multifariousness, 1031, 1036

Nature and purpose:

Affirmative relief to defendant, 1016, 1020

Discovery in aid of defense, 1016, 1018

Setting up new matter, 1016, 1019

Necessity:

Accounts and accounting, 1026

Affirmative relief sought by defendant, 1015, 1047

Discretion of appellate court to dispense with cross bill, 1029

Effect of plaintiff's failure to object, 1028

Patent infringement cases, 1027

Relief grantable upon answer without cross bill, 1015

Objection to bad cross bill filed by leave, 1064

Parties:

Bringing in new parties defendant, 1049, 1050, 1051

Codefendants, 1043, 1044

Discretion of court as to bringing in new parties, 1051

Exceptions to general rule, 1047

Interveners, 1047, 1362

Leave of court, 1048

Member of class represented, 1047

Person named as defendant in original bill, 1046

Plaintiff in original bill, 1045

Stranger to original bill, 1046

Principles governing use generally, 1015-1029

Recitals of original pleadings and proceedings, 1053

Relevancy to original bill:

Dismissal on demurrer for lack of relevancy, 1037

Illustrations, 1032

Introduction of new facts, 1033, 1034

Multifariousness, 1031, 1036

Necessity of relevancy, 1030

Under state statutes, 1035

Relief:

After dismissal of original bill, 1072

Cross plaintiff not restricted to equitable relief, 1042

Jurisdiction to afford complete relief, 1040

Remedy at law, effect of, 1040

Requisites:

Cause of equitable cognizance, 1040-1042

Consistent case, 1056

Definiteness and certainty, 1024

Offer to do equity, 1052

INDEX.

1953

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

CROSS BILL—*continued*

Requisites—*continued*

- Plaintiff must be concerned in controversy, 1057
- Precision and particularity, 1052
- Recitals of original pleadings and proceedings, 1053
- Relevancy to original bill, see *supra*, Relevancy to original bill
- Scope where litigation complex, 1034
- Service of process:
 - Necessity, 1065
 - Prerequisite to taking *pro confesso*, 1554
 - Substituted or constructive service, 613, 622, 623, 1066
- Setting down for hearing, 1069, 1904
- State statute, effect on right to maintain cross bill, 1035
- Stay of original suit pending hearing, 1068
- Suit to enforce or cancel deed, 1020
- Supplemental bill in nature of cross bill, 1181

CROSS-EXAMINATION:

- Death of witness before opportunity, 1749
- Difficulty under former practice, 1745
- Importance of right, 1745
- Latitude allowed to cross-examiner, 1752
- Leading questions in cross interrogatories, 1706
- Leave to cross-examine out of due course, 1750
- Necessity of giving opportunity, 1746
- Production of witness, 1747
- Refusal of witness to answer, 1748
- Scope, 1751
- Suppression of deposition for want of opportunity to cross-examine, 1746-1749
- Time of cross-examination, 1750

CROSS INTERROGATORIES:

See DEPOSITIONS

CURATOR:

- Suit by in behalf of insane person, 460

DAMAGES:

- Appeal taken for delay, 2203
- Contempt proceedings, 2501, 2502
- Preferential claim in receivership cases, 2742
- Reference to ascertain, 1399

DANIELL, EDMUND R.:

- Authority of treatise on chancery practice, 121

DATE:

- Writ of subpoena, 585
- Eq. Prac. Vol. III.—123.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2294; III, §§ 2295-2907.]

DEATH:

Abatement by death, 1208-1208

DE BENE ESSE:

See **BILL DE BENE ESSE**

DECISIONS:

Duty to avoid delay, 1917

English decisions, authority of in federal courts, 121

Of state courts do not affect federal equity jurisprudence, 95

Reservation of decision, 1914

Scope of final adjudication, 1918

Time of rendition, 1914

Written or oral opinion, 1917

DECLARATION:

Combining legal and equitable matters in, 18

DECREE:

Amendment, correction, and modification:

Clerical errors, 2065, 2066

Cognizance of motion, 2085

Consent decree, 2082

Court's control over decree during term, 2063

Decree entered by mistake or misrepresentation, 2068

Effect of appeal, 2078

Effect of enrollment, 1977

Effect of erroneous amendment, 1081

Equity rule, 2068

Federal decrees, 2066

Final decree:

Adjournment *sine die*, 2076

After end of term, 2074

Appeal as affecting right, 2078

Determination of end of term, 2076

During term, 2073

Keeping minutes open until following term, 2077

Meaning of "final" with relation to altering, 2075

Statutes, 2076

General power of court to alter decree, 2063-2068

Inconsistent decrees, 2067

Interlocutory decrees:

Correction to conform to ruling of appellate court, 2070

Grounds for changing or setting aside, 2071

Power of court while cause pending, 2069

Judicial and clerical errors distinguished, 2067

Mode of enforcement, 2072

Mode of proceeding, 2064

INDEX.

1955

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DECREE — continued

- Amendment, correction, and modification — *continued*
 - Opening for further evidence, 2083, 2084
 - Petition for rehearing, see REHEARING
 - Right to change before entry, 1955
 - Second decree at same time, 2087
- Appeals:
 - Effect on right to modify decree, 2078
 - Final decrees, 1937
 - Illustrations of appealable final decrees, 1938
 - Interlocutory decrees, 1937
 - Basis on rights existing at time of rendition, 1951
 - Bill of revivor, 1224, 1225
 - Bill to construe decree, 1243
 - Cause heard on bill and answer, 819, 820
 - Class suits, 549, 551, 552
 - Collateral attack on, 1940
 - Commencement, 1962
 - Conformity of relief to pleadings, 247, 248, 1989-1941
- Consent decrees:
 - Form of, see FORMS
 - Grounds for review, 1957
 - Infant parties, 1958
 - Modification or vacation of, 2082
 - Nature and effect, 1957
 - Power of guardian *ad litem* to consent to decree, 492
 - Validity of decree by consent of guardian *ad litem*, 493
- Consolidated causes, 1316
- Construction, 1243
- Contempt proceedings, see CONTEMPT
- Control of court over decree during term, 2063
- Correction, see *supra*, Amendment, correction, and modification
- Damages on appeal taken for delay, 2203
- Declaratory part, 1964
- Decree *nisi* where party fails to appear at hearing, 1910
- Decree *pro confesso*, see TAKING BILL *Pro Confesso*
- Decretal order, definition of, 1934
- Disposing of plea, see PLEA
- Disqualification of judge, 1905
- Distinction between opinion and decree, 1920
- Distinction between order and decree, 1932
- Drawing decree:
 - English practice, 1953
 - Federal practice, 1954
- Effect in class suits, 549, 551, 552
- Effect of erroneous amendment, 1081
- Effect on absent parties, 520, 534

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DECREE — continued

Enforcement:

- Ancient process of chancery court, 2207
- Bill to effectuate decree, see **BILL TO EFFECTUATE DECREE**
- Contempt proceedings, 2209-2214
- Enforcement through master, receiver, or commissioner, 2208
- Form of bill to execute decree, see **FORMS**
- Form of plea, see **FORMS**
- Lien of decree, 2200, 2201
- Modification as to mode of enforcement, 2072
- Money decrees:**
 - Contempt proceedings, 2204-2206
 - Equity rule, 2198, 2204
 - Interest, collection of, 2202
 - Order for payment of money, 2204
 - Process available in English chancery, 2196
 - Writ of execution, 2197-2199
- Sequestration, 2212
- Writ of assistance, 2215-2225
- Writ of execution of decree, 2209-2214

Enrollment:

- Correction of clerical errors after enrollment, 2066
- Effect, 1977
- English practice, 1971
- Enrollable decrees, 1972
- Federal practice generally, 1974
- Following analogy of English practice, 1976
- Formalities under English practice, 1973
- Relation to end of term, 1978
- What should be enrolled, 1975

Entry:

- Consent decree generally, 1957
- Consent decree on behalf of infant, 1958
- Correction before answering, 1955
- End of litigation by entry of final decree, 1979
- Leaving with clerk as entry, 1956
- Manner of entering, 1956
- Notice to clerk, 1956

Nunc pro tunc:

- Conditions justifying, 1969
- Effect, 1970
- Parties, 1968
- Time when permissible, 1968

Order to enter, 1955

Stipulation for entry, 1969

Extent of relief in general, 1939-1952

Final:

- Amendment, etc., see *supra*, **Amendment, correction, and modification**

INDEX.

1957

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DECREE — *continued*

Final — *continued*

- Appeals, 1937, 1938
- Definition, 1936
- Determination of finality with relation to rehearing, 2090, 2091
- Statute of appeals, 1937, 1938

Foreclosure cases, see FORECLOSURE

Form:

- Commencement, 1962
- Declaratory part, 1964
- Decree apportioning liabilities, 1967
- Enumeration of formal parts, 1960
- Examples of forms, see FORMS
- Ordering or mandatory part, 1965
- Recitals, 1963
- Style of cause, 1961

Impeachment, see BILL TO IMPEACH DECREE

Incidents of making and perfecting generally, 1953-1970

Infant parties, see INFANTS

Interest on decree:

- Deficiency decree, 2897
- Generally, 2202

Interlocutory:

- Amendment, etc., see *supra*, Amendment, correction, and modification
- Appeals, 1937
- Control of court at final hearing, 1918
- Definition, 1935
- Vacation on account of decision of higher court, 2070

Interpleader, 2251, 2252

Lien of decree:

- Duration, 2201
- Effect of state law, 2200

Mandatory part, 1965

Modification, see *supra*, Amendment, correction, and modification

Nunc pro tunc, see *supra*, Entry

Opening for further evidence:

- Defense by absent party, 2084
- Discretion of court, 2083
- Motion or petition, 2083

Ordering part, 1965

Orders, see ORDER

Overruling or sustaining plea, see PLEA

Petition to amend decree, 1190

Prejudice to defendant, effect of, 1952

Priority between inconsistent decrees at same term, 2087

Pro confesso, see TAKING BILL PRO CONFESSO

Protection of rights of both parties, 1947

Recitals, 1963

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

DECREE — continued

Relief grantable:

- Affirmative relief to defendant, 1947
- Determination of rights among codefendants, 1948, 1949
- Effect of prejudice to defendant, 1952
- Extent in general, 1939-1952
- Prayer for alternative relief, 1946
- Relief against coplaintiff, 1950
- State of pleadings as affecting, 1949
- Under general prayer, 1943-1946

Reservation of liberty to make further application to court, 1966

Responsiveness to issues, 1940

Review by bill, see **BILL OF REVIEW**

Revivor, bill of, 1224, 1225

Scope:

- Disposal of all issues, 1942
- In general, 1939-1952
- Signature by judge, 1955
- Style of cause, 1961
- Substitution of record, effect of, 1915
- Suspension pending review on bill, 2128
- Title of cause, 1961
- Vacation:
 - Cognizance of motion, 2085
 - Consent decree, 2082
 - Decree *pro confesso*, 2079
 - Discretion of court, 2080
 - Effect of setting decree aside, 2086
 - Interlocutory decree inconsistent with decision of higher court, 2070
 - Motion to vacate for irregularity, 2079
 - Parties, 2081
 - Who may apply, 2081
- Validity of decree rendered on erroneous substitution of record, 1915

DECRETAL ORDER:

Definition, 1934

DEDIMUS POTESTATEM:

- To take answer, 685
- To take deposition, 1695, 1696. See **DEPOSITION**

DEED:

- Cross bill or answer in suit to enforce or cancel deed, 1020
- Proof of deeds as exhibits, 1621

DEFAULTS:

- Bill of review, 2148
- Effect of default on receiver, 2572

INDEX.

1959

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DEFENSE:

Answer as defense, see ANSWER
Persons under disability generally, 485-501

DEFENSE AT LAW (see also REMEDY AT LAW):

Additional equity, existence of, 81
Compared with remedy at law, 79
Counterclaim, 84
Equitable defenses in legal actions, 14-17, 1235
Estoppel, 82
Set-off, right of, as affecting jurisdiction of equity, 83
When defense must be available, 80

DEFINITENESS AND CERTAINTY:

Admissions of demurrer as affected by, 928
Allegations in bill, when lack of certainty excusable, 180
Allegations of defendant's interest, 209
Amount in controversy, allegations of, 358
Answer setting up *bona fide* purchase, 859
Bill, allegations of, in general, 180, 185, 209
Bill of revivor, 1218
Consideration, 197
Cross bill, 1024
Decision on demurrer as affected by, 965
Demurrer for lack of, 932
Diverse citizenship, allegation of, 324
Exceptions to depositions, 1822, 1823
Exceptions to master's report, 1485, 1487
Extraordinary relief, bill seeking, 193
Fraud, 186, 187, 188, 189, 191
Interest of defendant, 209
Jurisdictional averments generally, 310, 324
Misconduct, 192
Negligence, 192
Notice of taking deposition, 1796
Patents, bill to restrain infringement of, 200
Personal and intangible rights, bill based on, 196
Plea of *bona fide* purchase, 857, 858
Plea of contract between husband and wife, 860
Pleas generally, 854
Quieting title, bill for, 195
Reformation, bill for, 194
Remedy for lack of certainty in allegations of bill, 185
Report of master, 1451, 1454
Subpoena *duces tecum*, 1849, 1850
Trusts, bill to declare, 198, 199

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

DEMURRER:

Abandonment of demurrer, 962

Admissions by:

Certainty of allegations as affecting admissions, 928

Facts well pleaded, 926

Inferences, 926, 927

Legal conclusions, 926

Affidavit of defendant:

Amendment to supply, 956

Answer not under oath, 954

Decree *pro confesso* for want of, 955

English practice, 954

Equity rule requiring, 954, 955

Necessity for, 954, 955

Striking out for want of, 955

Waiver, 954, 955

Amendments:

Amendment of demurrer, 1138

Availability of demurrer after amendment, 917

Demurrer to amendment constituting new cause of action, 1091

Alternative statement of grounds, 952

Answer not subject to demurrer, 917

Answer overrules demurrer, 974

Answer, plea, and demurrer to same bill, 975, 978

Argument of demurrer in general, 961-972

Basis on matter of record, 921

Bill alone subject to demurrer, 917

Bill of review, 2171

Bill to perpetuate testimony, 1772

Capacity of plaintiff to sue, 931

Certificate of counsel:

Amendment to supply, 956

Application for preliminary injunction, 955

Decree *pro confesso* for lack of, 955

English practice, 954

Equity rule requiring, 954, 955

Necessity for, 954, 955

Striking out for want of, 955

Waiver by arguing demurrer, 956

Certificate of solicitor, 937

Citizenship of plaintiff, 1931

Classification:

Demurrer to form of bill, 932

Demurrer to jurisdiction, 930

Demurrer to person, 931

Demurrer to substance of bill, 923

Sorts of demurrer enumerated, 929

Conclusions of law, admission by, 926

INDEX.

1961

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

DEMURRER — *continued*

- Conclusiveness of issue presented by demurrer, 972
- Costs where demurrer overruled, 969
- Cross bill, demurrer to, 917, 1022, 1037
- Decision on demurrer:
 - Allowance of amendment of bill, 966, 967
 - Answer after demurrer overruled, 968
 - Bill framed in double aspect, 964
 - Certainty of bill as affecting, 965
 - Costs, 969
 - Demurrer bad in part wholly bad, 946
 - Demurrer to whole bill when bill good in part, 945
 - Discretion of court, 963
 - Forms relating to, see FORMS
 - General demurrer for formal interrogatories, 947
 - General demurrer for want of equity, 945
 - Order sustaining demurrer to part of bill, 970
 - Reserving demurrer to final hearing, 964
 - Special demurrer to prayer for extraordinary relief, 950
 - Striking out objectionable paragraph of bill, 947
 - Terms on allowing answer, 909
 - Transfer of cause to proper docket, 947
- Defects demurrable generally, 920
- Defects must be apparent on face of bill, 921
- Discovery, demurrer to, see DISCOVERY
- Discretion in disposing of demurrer, 963
- Election to stand on demurrer, 971
- Entitling, 951
- Evidence not subject to demurrer, 917
- Extension of time to plead, 871
- Extrinsic matter in demurrer, effect of, 923
- Filing, 957
- For absence of necessary party, 515
- For failure to allege citizenship, 326
- Formalities incident to demurring generally, 951-960.
- Form generally, 951
- Forms relating to, see FORMS
- For multifariousness, 436, 441, 556, 557, 925, 936, 938
- For remedy at law, 85
- General demurrer:
 - Conspiracy charged in bill, 965
 - Defects reached by, 934
 - Direction to whole or part of bill, 945, 946
 - Effect of sustaining, 934
 - Formal interrogatories not available, 947
 - Fraud charged in bill, 965
 - Nature and form, 934
 - Special in connection with general demurrer, 937

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DEMURRER — continued

General principle governing use, 920

Grounds of demurrer:

Another suit pending, 933

Assigned ground, necessity of, 934

Defect of parties, 575, 933, 946

Defendant not answerable to plaintiff, 933

Equitable estoppel, 941

Failure to offer equity, 932

Failure to state residence of parties, 932

Jurisdiction of court, 930, 941

Laches, 943

Lack of certainty in allegations, 932

Misjoinder of parties, 941

Multifariousness, 938

Non-existence of subject-matter, 941

Plaintiff not entitled to relief, 933

Remedy at law, 941

Statute of frauds, 941

Statute of limitations, 942

Want of equity, 941

Want of interest in subject-matter, 923

Improper joinder of parties, 925

Incorporation in answer, see ANSWERS

Infancy of plaintiff, 931

Injunction cases, 950, 2328

Insufficiency of answer, 772

Insufficiency of jurisdictional averments, 372

Joinder, 961

Kinds of demurrer, 931

Language to be direct and concise, 958

Legal conclusions, admission by, 926

Matters reached by demurrer:

Defects affecting whole or part of bill, 920

Exhibits to bill, 921

New matter incorporated in bill, 921

Pleadings reachable by demurrer, 917

Rule that demurrer reaches back, 918

Speaking demurrer, 922

Misjoinder of causes of action, 436, 441, 925, 938

Misjoinder of parties, 556, 557, 925, 938

Mitford's rule as to nature of function, 920

Motion to strike instead of demur, 932

Multifariousness, 436, 441, 556, 557, 925, 936, 938

Nature and functions generally, 917-928

Notice to plaintiff, 957

Number of causes of demurrer assignable, 924

Office of demurrer, 910

INDEX.

1903

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DEMURRER — *continued*

Ore tenus:

- Conditions precedent to, 938
- Demurrer to whole bill as foundation for, 937
- Direction to whole or part of bill, 940
- Lack of necessary parties, 938
- Manner of making, 938
- Misjoinder of parties or causes of action, 938
- Scope, 939

Petition for rehearing, 9108

Petition of intervention, 1372

Petitions generally, demurrer to, 1299

Plaintiff married woman, 931

Plea:

- Choice between plea and demurrer, 828
- Demurrer to plea, propriety and effect of, 873, 917
- Overruling demurrer by plea, 974
- Plea, answer, and demurrer to same bill, 975, 978

Prayer of, 953

Pro confesso for failure to plead, answer, or demur, 1552

Protestation clause, 951

Questions of venue, see VENUE

Remedy at law, demurrer for, 85

Reservation of confession of matters in bill, 951

Right to demur after plea or answer filed, 960

Rule that demurrer reaches first defective pleading, 918

Scope and effect generally, 945, 950

Setting down for argument:

- Dismissal for failure to set down, 1344
- Necessity, 961
- Practice on setting down, 961
- Time for setting down, 961
- Waiver of objection to filing of incompatible pleading, 983

Signature, 954

Speaking demurrer, 922

Special demurrer:

- Advantage of, 935
- Direction to whole or part of bill, 935, 937, 948
- General in connection with special demurrer, 937
- Multifariousness as ground of, 936
- Nature and form, 935
- Prayer for extraordinary relief not reached by, 950
- Precision required, 949
- Scope in general, 948
- When necessary, 936

Standing on demurrer, 971

Supplemental bill, see SUPPLEMENTAL BILL

Surplusage in demurrer, 923

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DEMURRER — *continued*

- Testing legal sufficiency of defense, 811
- Time to demur:
 - Analogy to time to plead or answer, 958
 - Determination with reference to rule days, 678, 1266
 - Extension of time, 959
 - Motion to extend time, 681
 - Rule day falling on holiday, 958
 - Waiver of failure to demur in time limited, 680
- Uncertainty whether pleading is answer or cross bill, 1024
- Venue, questions of, 387, 392
- Waiver by answer to merits, 714
- Waiver of defect of venue by general demurrer, 387
- Waiver of defects generally, by failure to demur, 944
- Waiving benefit of demurrer, 962
- What pleadings subject to demurrer generally, 917
- Who may demur, 925
- Withdrawal of plea or answer to allow demurrer, 960

DEPENDENT BILL:

- Classification of, in general, 144
- Definition, 142
- In nature of original bill, 148
- Property in custody of court, 1246
- Types of, 145, 146

DEPOSIT IN COURT:

See **FUNDS AND DEPOSITS IN COURT**

DEPOSITIONS:

- Additional evidence after publication of testimony, 1763, 1764
- Adjournment of taking, 1801
- Admissions by, 1832
- Adoption of answers of another, 1804
- Amendment of certificate, 1816
- Amendment to obviate re-examination, 1760
- Analogy to answer, 1140
- Caption, 1800
- Certificate:
 - Amendment, 1816
 - Certificate as evidence, 1810
 - Certificate on envelope, 1813
 - Facts to be certified, 1810
 - Informalities, effect of, 1811
 - Recitals, 1812
 - Suppression of deposition for fundamental defects in certificate, 1811
- Commission:
 - Authority of commissioner to execute, 1709

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

DEPOSITIONS — *continued*

Commission — *continued*

- Clerical errors, effect of, 1794
- Commission to take testimony abroad, see *infra*, Commission to take testimony abroad
- Composite commission, 1671
- Dedimus potestatem* and commission identical, 1695, 1696
- English practice:
 - Adjournment of proceedings, 1642
 - Alterations in deposition, 1643
 - Appointment of commissioners, 1641
 - Commission to examine witness abroad, 1645, 1646
 - Direction of testimony, 1643
 - Examination of witnesses, 1643
 - Foreign witness, 1645, 1646
 - Interpreters, 1646
 - Interrogatories and cross interrogatories, 1643
 - Issuance of commission, 1639
 - Joint commission, 1640
 - Language of deposition, 1646
 - Number of commissioners, 1641
 - Opening commission, 1642
 - Opening deposition, 1642, 1644
 - Order of court, 1639
 - Procuring attendance of witness, 1642
 - Propriety of commission, 1634, 1639
 - Qualifications of commissioners, 1641
 - Reading deposition to witness, 1643
 - Return of deposition on commission, 1644
 - Right to be present at examination, 1642
 - Signature of deposition, 1643
- Execution, 1709, 1710
- Federal practice generally, 1694-1716
- Issuance under federal practice, see *infra*, Issuance of commission
- Oral examination, 1708
- Commission to take testimony abroad:
 - Authority to issue, 1711
 - Certificate of commissioner, 1715
 - Equity rule, 1711
 - Express testimony, 1713
 - Formalities incident to taking depositions, 1715
 - Motion for order, 1712
 - Notice to diverse party, 1712
 - Oath of commissioner, 1715
 - Revised Statutes of United States, 1711
 - Second commission, 1714
- Compelling attendance of witnesses:
 - Letters rogatory from foreign country to federal court, 1744
 - Statutory depositions on notice, 1725-1727

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2225-2897.]

DEPOSITIONS — *continued*

- Compelling attendance of witnesses — *continued*
- Witnesses within district, 1673
- Conformity with state law, see *infra*, Taking in conformity with state law
- Contempt proceedings, 2475
- Costs on re-examination of witnesses, 1762
- Cross-examination:
 - Death of witness before opportunity, 1749
 - Difficulty under former practice, 1748
 - Importance of right, 1745
 - Latitude allowed to cross-examiner, 1752
 - Leading questions in cross-interrogatories, 1706
 - Leave to cross-examine out of due course, 1750
 - Necessity of giving opportunity, 1746
 - Production of witness, 1747
 - Refusal to answer, 1748
 - Scope generally, 1751
 - Suppression for want of opportunity to cross-examine, 1746-1749
 - Time of cross-examination, 1750
- Cross-interrogatories:
 - Definition, 1702
 - Difficulty of cross-examination under ancient practice, 1745
 - Examination on interrogatories and cross-interrogatories, 1643
- De bene esse:*
 - Basis of practice, 1783
 - Bill, see BILL DE BENE ESSE
 - Competency of evidence taken under rule, 1779
 - Duty to proceed under equity rule, 1777
 - English practice, 1784-1789
 - Equity rules, 1778
 - Modes of taking evidence *de bene esse*, 1777
- Motion or petition in cause:
 - Affidavit, 1787
 - Application, 1787
 - Effect of equity rule and statute on federal practice, 1788
 - Notice to adverse party, 1786
 - Order of course, 1786
 - Propriety of, 1785
- Publication, see PUBLICATION OF TESTIMONY
- Statutory proceeding:
 - Availability of statutory method pending appeal, 1782
 - Construction of statute, 1783
 - Provisions of Revised Statutes, 1780
 - Time of taking evidence under statutes, 1781
- Dedimus potestatem*, see *supra*, Commission
- Definition, 1793
- Evidence:
 - Admission by deposition, 1832
 - Contents of lost deposition, 1830

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DEPOSITIONS — *continued*

Evidence — *continued*

Deposition best evidence of own contents, 1828

Deposition taken in another suit, 1831

Effect of consent to introduction, 1829

Examination before examiner of court, see **PROCEEDINGS BEFORE EXAMINER**

Examination on interrogatories and commission, see *supra*, Commission;
infra, Interrogatories

Exceptions:

Definiteness and certainty, 1822, 1823

Form and requisites, 1822

General objection where deposition good in part, 1823

Grounds in general, 1818, 1819

Specific grounds, 1819

Time for exceptions, 1820, 1821

Writing, 1822

Execution of commission:

Authority of part of commissioners, 1709

Commission to take testimony abroad, 1715

District of Columbia, 1710

Letters rogatory, see *infra*, Letters rogatory

United States commissioner, 1709

Exhibits, see EXHIBITS

Formalities incident to taking generally, 1792-1806

Interrogatories:

Adoption of answers of another, 1804

English practice as to writing, 1702

Examination on interrogatories and cross-interrogatories under English
practice, 1643

Exceptions to, 1707

Leading questions:

Cross-examination, 1706

Exceptions to rule against, 1705

Objections to, 1704

Penalty for, 1704

Letters rogatory, see *infra*, Letters rogatory

Original interrogatories, definition of, 1702

Preparation of answers in advance of examination, 1803

Proceedings before examiner of court, 1666

Scope and form in general, 1703

Issuance of commission:

Apprehension of failure or delay of justice, 1700

Commission to take testimony abroad, 1711

Considerations bearing on propriety, 1700

Equity rules, 1697

Federal rules and statutes generally, 1695

In aid of action at law, 1701

Judiciary Act, 1696

Order, 1694

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2285-2897.]

DEPOSITIONS — continued

Issuance of commission — continued

- Refusal where party can proceed upon notice, 1700
- Revised Statutes of United States, 1698
- Summary of rules and statutes, 1699
- Tendency of cause in another court, 1701

Letters rogatory:

- Application for, 1738
- Compelling attendance of witnesses in federal court, 1744

Execution:

- By whom executed, 1739
- Irregularities in execution, 1742
- Letters and commissions from foreign countries to federal courts, 1743, 1744
- Form in general, 1737
- Interrogatories accompanying, 1737
- Nature, 1737
- Necessity of, 1736, 1737
- Oral examination under, 1740
- Power of court to issue, 1736
- Return of letters and depositions, 1741
- Lost depositions, proving contents of, 1830
- Methods of taking in federal courts, 1666
- Motion to suppress:
 - Appellate court, 1827
 - Defects waived by failure to move, 1826
 - Errors available, 1824
 - Necessity, 1818, 1824
 - Object, 1824
 - Time of making, 1825
 - Waiver of defects by failure to move, 1826
 - Want of opportunity to cross-examine, 1746-1749

Notice:

- Commission to take testimony abroad, 1712
- Definiteness and certainty, 1798
- Immaterial errors in, 1798
- Naming officer, 1799
- Necessity, 1795
- Reasonableness, 1798
- Return of notice, 1797
- Statutory depositions on notice, see *infra*, **Statutory depositions on notice**
- Officer who may take, 1799
- Opening, see **PUBLICATION OF TESTIMONY**
- Oral testimony under commission, 1708
- Perpetuation of testimony, see **PERPETUATION OF TESTIMONY**
- Preparation of answers in advance of examination, 1803
- Proceedings before examiner of court, see **PROCEEDINGS BEFORE EXAMINER**
- Publication of testimony, see **PUBLICATION OF TESTIMONY**

INDEX.

1969

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DEPOSITIONS — *continued*

Re-examination of witnesses:

- Amendment instead of, 1760
- Conditions justifying in general, 1760
- Costs on re-examination, 1762
- Necessity of showing good cause, 1759
- Order of court, necessity for, 1759, 1761
- Reason against allowance, 1759
- Terms on granting order, 1762
- Use of carbon copy of previous deposition on second examination, 1804

Return:

- Depositions taken abroad, 1716
- Depositions taken without appointment of examiner, 1688
- Duty of officer to make return, 1688, 1814
- Letters rogatory, 1741
- Mode of return, 1815
- Statutory depositions on notice, 1732
- Withdrawal from files, 1816, 1817

Second examination of witness, see *supra*, Re-examination of witnesses

Signature, 1687, 1806

State laws, see *infra*, Taking in conformity with state law

Statutory depositions on notice:

- Abandonment of proceeding, 1727
- Certificate of officer, 1729, 1730
- Compelling attendance of witnesses, 1725-1727
- Conditions under which statutory method proper, 1718
- Conformity with state law, see *infra*, Taking in conformity with state law
- Cross-examination by party without notice, 1724
- Determination of distance of witness from place of trial, 1722
- Formalities incident to taking depositions generally, 1723-1732
- Judicial notice of distance of cities from place of trial, 1722
- Letters rogatory, see *supra*, Letters rogatory
- Method of giving notice, 1723
- Mode of taking deposition in general, 1719
- Necessity that cause be at issue, 1721
- Provisions of Revised Statutes, 1719
- Reducing deposition to writing, 1728
- Relation of rules and statutes, 1717
- Return into court, 1732
- Scope of statutes, 1717
- Sealing, 1731
- Stenographer, use of, 1728
- Subpoena *duces tecum*, 1725
- Territory in which statutory method available, 1720
- Testimony to be taken abroad, 1720
- Time to take, 1721

Eq. Prac. Vol. III.—124.

{References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.}

DEPOSITIONS — *continued*

Stenographers:

- Statutory depositions on notice, 1728
- Testimony taken through interpreter, 1805

Suppression, see *supra*, Motion to suppress

Taking in conformity with state law:

- Discretion of court, 1734
- Effect of statute, 1734, 1735
- Rules of evidence, 1735
- Statute permitting, 1733

Withdrawal from files, 1816, 1817

Withdrawal of party for irregularity, 1802

DISBURSEMENTS:

- Affidavit verifying, 2062
- Memorandum of, 2060

DISCLAIMER:

- Costs, 2001, 2007
- Form of, see **Forms**
- Want of interest of defendant, 832

DISCOVERY:

- Answer, discovery by, in general, see **ANSWER**
- Bearing of, on equity procedure, 156

Bill:

- Effect of waiving oath to answer, 1890
- Necessity of specific interrogatories, 1866
- Original bill, 155
- Verification, 305
- Waiver of oath of answer, 1866, 1867

Bill to effectuate decree, 2230

Contempt proceedings, right of plaintiff, 2476

Corporations:

- Joiner of officer as defendant, 1874
- Matters discoverable, 1875
- Right to enforce discovery from corporation, 1873

Cross bill for discovery, 1016, 1018, 1868

Defendant's right to discovery, 1868, 1893

Demurrer to discovery:

- Anomalous demurrer, 1879
- Form of demurrer, 1876
- Incriminating matters, 1876
- Irrelevancy of evidence, 1876, 1877
- Pleading over on overruling of demurrer, 1880
- Privileged matter, 1876
- Propriety in general, 1876

Dependent on title to relief, 1869

INDEX.

1971

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DISCOVERY — *continued*

Discovery and relief:

Generally, 1865-1875

Power of equity courts, 1865

Remedy at law, 1870

Documents, production of, see PRODUCTION OF DOCUMENTS; SUBPOENA DUCE斯
TECUM.

Duty of defendant to answer fully, 1866

Effect of affirmative, negative, and anomalous pleas on right, 986, 987

Exceptions to answer for insufficiency, see ANSWER

Extent of discovery, 1872

Identity of person subject to legal liability, 1864

Importance of principle, 1860

Jurisdiction to enforce:

Basis of jurisdiction, 1861

Bill in aid of action at law, 1863, 1864

Discovery incident to equitable relief, 1865

Statutory power of law courts, 1862

Law courts, 1862

Lost instruments, 1871

Matters pertaining to plaintiff's title, 1872

Plea:

Effect of affirmative, negative, and anomalous pleas on right, 986, 987

Not vehicle of discovery, 826, 827

Principle of discovery in bills for relief, 1866

Privileged matter, 1876, 1886

Production of documents, see PRODUCTION OF DOCUMENTS; SUBPOENA DUCE斯
TECUM

Remedy at law, 1870

Right of discovery as affecting equity jurisdiction, 58

Right to discovery where plea not supported by proof, 910

Simple discovery generally, 1860, 1864

Supplemental bill, discovery by, 1160, 1198

DISMISSAL:

Adequate remedy at law as ground for, 88, 91, 1347

Amendment to avoid, 1342, 1343

Ancillary proceedings, 1255

Application by plaintiff, 1326

Bill, dismissal of for informality, 306

By court on own motion, 1342

Collusion between parties, 1342

Considerations justifying denial of leave to plaintiff, 1333

Consolidated causes, 1316

Contract contrary to public policy, 1342

Costs on dismissal, see Costs

Cross bill:

Application to dismiss before cross bill filed, 1338

INDEX.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DISMISSAL — continued**Cross bill — continued**

Defeat of plaintiff's right by filing cross bill, 1335

Denial of dismissal without prejudice, 1335

Dismissal of original bill without prejudice to cross bill, 1337

Failure to file replication, 1336

Defendant entitled to affirmative relief, 1334

Discretion of court:

After interlocutory decree, 1332

Dismissal without prejudice, 1347

Prejudice to defendant, 1330

Voluntary dismissal, 1328

Want of authority of solicitor, 573

Dispensable party, dismissal as to, 530

Duration of plaintiff's right to dismiss, 1326

Failure of party to appear at hearing, 1910

Failure to prosecute suit, 1345

Failure to reply or file replication, 802, 803, 805, 1344

Failure to serve defendant, 1308

Forms relating to, see FORMS

For want of indispensable parties, 521, 522

For want of jurisdiction, 372 *et seq.*

Hearing on bill and answer, 820

Illegal contract, 1342

Immoral contract, 1342

Impossibility of making decree effective, 1951

Informality of bill, 1344

Involuntary dismissal, 1342-1348

Lapse of three terms, 1309

Leave of court:

Bill attacking title to property, 1333

Considerations justifying denial of leave to plaintiff, 1333

Discretion of court, 1328

Necessity of leave, 1327

Waiver by lapse of time, 1327

Misjoinder or nonjoinder of parties, 521, 522, 1344, 1347

Motion:

By court, 1342

By defendant, 1343-1345

Distinction between motion to dismiss and motion to strike, 1346

Time of motion by plaintiff, 1326, 1328, 1329, 1331, 1332

On sustaining plea, 899, 900

Order:

Form of, see FORMS

Involuntary dismissal:

Dismissal without prejudice, 1347

General dismissal, 1348

Vacation of order, 805

INDEX.

1973

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DISMISSAL — *continued*

Order — *continued*

Voluntary dismissal:

- Allowance of use of evidence in future suit, 1341
- Form in general, 1339
- Payment of costs, 1340
- Reservation of rights, 1339
- "Without prejudice," 1339

Petition, 1299

Prejudice to defendant as affecting plaintiff's right, 1329, 1335

Public policy, 1342

Right of plaintiff to dismiss generally, 1326

State of proof as affecting plaintiff's right, 1331

Suit instituted without consent, 571

Terms on voluntary dismissal, 1326, 1327, 1340

Time of motion by plaintiff:

- After interlocutory decree, 1332
- Effect of delay until proof all taken, 1328, 1331
- Effect of setting down cause for hearing, 1326

Vacation of order of dismissal, 805

Voluntary dismissal by plaintiff, 1326-1341

Want of authority of solicitor, 573

Want of equity in bill, 1342

DISTRICT COURT:

- Admiralty jurisdiction, 3
- Bankruptcy, jurisdiction in, 3
- Equity jurisdiction, 3
- Rules, power to make, 114, 115

DISTRICT OF COLUMBIA:

- Equity rules, applicability in, 112
- Execution of commission to take testimony in, 1710

DISTRINGAS:

- Enforcing appearance of corporation, 673, 674

DIVERSITY OF CITIZENSHIP:

Aliens, see *infra*, Suits between citizens and aliens

Allegation of diversity:

- Accuracy required, 331
- Alternative allegation, 329
- Assignees, 346-348
- Change of citizenship after suit brought, 334
- Citizenship of all parties, 325
- Citizenship unknown, 333
- Definiteness and certainty, 324
- Demurrer for want of allegation, 326
- Inference permissible, 331

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DIVERSITY OF CITIZENSHIP — *continued*

Allegations of diversity — *continued*

- Judicial notice that state is member of Union, 332
- Necessity of showing in bill, answer, or record, 326
- Part of bill appropriate, 328
- Persons suing in representative capacity, 327
- Residence, allegation of, 330

Amendments, 1087

Collusive transfers to give jurisdiction, 380

Consolidation of causes, 1313

Constructive service of process where citizenship diverse, 631

Corporations and limited companies:

- Corporation domesticated in foreign state, 344
- Corporation suing as citizen of state, 337
- Early doctrine, 338
- Foreign corporations, 351
- Insufficient averments, 343
- Joint stock company, citizenship of members, 345
- Limited partnership, citizenship of members, 345
- Mode of pleading, 341
- Present practice, 340
- Presumption as to citizenship of stockholders, 339
- Sufficient averments, 342

Demurrer for want of allegation, 326

Foreclosure of mortgages, 2812

Interveners, 1363

Judicial notice that state is member of Union, 332

Necessity of showing in bill, answer, or record, 326

Plea in abatement, 830

Proof to support allegations, 336

Receivership suits, 2690, 2691

Suits between citizens and aliens:

- Foreign corporation, alleging alienage of, 351
- Form of allegation, 350
- Insufficient averment, 352
- Necessity of alleging alienage, 349

Suits by assignees:

Citizenship of original holder of chose in action, 346

Citizenship of plaintiff, 348.

Time to which averment must refer, 347

Transfer of legal title and beneficial interest to create diversity, 379-380

Venue, when dependent on, 385

DIVISION OF COURT:

Effect on costs, 2032

DIVORCE:

Failure to appear at hearing, 1910

INDEX.

1975

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

DOCKET:

Rule docket, 1263

DOCKET FEE:

Taxation in favor of solicitor, 1990

DOCUMENTS:

Charging in bill, 225

Necessity of pleading, 276

Plead according to legal effect, 278

Presumption as to correctness of recitals, 284

Production, see PRODUCTION OF DOCUMENTS; SUBPOENA DUCES TECUM

Recitals in full, when proper, 279

Substance only to be stated, 277

Taking from clerk's office, 285

DOUBLE PLEADING:

See PLEA

DUE PROCESS OF LAW:

Contempt proceedings, 2451

Injunction, 2285

DUPLICITY:

Double pleading, see PLEA

EJECTMENT:

Equity jurisdiction, 60

Remedy by ejectment in suits to quiet title, 61, 62

ENEMY:

Alien enemy:

Capacity to be sued, 498

Capacity to sue, in general, 448-451

Right to defend suit, 498

Subject of enemy country residing in United States, 451

Suspension of pending suit during hostilities, 450

ENGLISH CHANCERY PRACTICE:

Analogy of federal practice to English system, 97

English decisions and books of practice, authority of, 121

Harmony with federal system, 120

Orders in chancery, see ENGLISH ORDERS IN CHANCERY

When followed in general, 119

ENGLISH ORDERS IN CHANCERY:

Embodiment in federal rules, 122

Particular rules, citations of, see *infra*, Particular rules

[References are to pages.]

ENGLISH ORDERS IN CHANCERY — *continued*

[The text of the English Orders in Chancery is given in full in the Appendix to Volume III, pp.1715-1761. For convenience a synopsis of the Orders is given here, with specific references to pages.]

SYNOPSIS OF ENGLISH ORDERS IN CHANCERY.

- Accounting before master, Ord. 61-63, p. 1728
- Accounting — order of reference, Ord. 5, p. 1747
- Affidavits in reply before master, Ord. 66, p. 1729
- Affidavits previously read in cause, Ord. 65, p. 1729
- Amendment of bill after answer, Ord. 13, 14, pp. 1717, 1718
- Amendment of bill after replication, Ord. 15, p. 1718
- Amendments to injunction bills, Ord. 2, 3, p. 1746
- Answer by defendant in country cause, Ord. 3, p. 1715
- Answer, exceptions and punishment for insufficiency of, Ord. 5-10, pp. 1715, 1716
- Appearance — defendants against whom no direct relief sought, Ord. 23-29, pp. 1755-1757
- Application for new trial of issue at law, Ord. 47, p. 1725
- Application to discharge order of course for irregularity, Ord. 6, p. 1747
- Application to sitting master of vacation, Ord. 25, p. 1739
- Application to stay proceedings, Ord. 46, p. 1725
- Apportionment of funds and securities, Ord. 28, p. 1740
- Attachment to compel obedience, Ord. 6, p. 1761; Ord. 10, p. 1752
- Attendance before master, Ord. 59, p. 1727
- Bill of rehearing — recitals of prior proceedings in, Ord. 50, p. 1761
- Bill of revivor — recitals of pleadings in, Ord. 49, p. 1761
- Certificate as to state of cause, Ord. 43, p. 1724
- Certificate of master as to costs of exceptions to answer, Ord. 19, p. 1738
- Certificate of proceedings by master, Ord. 57, p. 1727
- Clerk of affidavits, when office open, Ord. 36, p. 1745
- Clerks of reports and entries, Ord. 30, p. 1743
- Common order to revive, Ord. 8, p. 1734
- Computation of time allowed to party, Ord. 19, p. 1720
- Conditions of order for further time to answer, Ord. 21, p. 1738
- Contempt for insufficient answer after prior contempt for want of answer, Ord. 24, p. 1720
- Costs:
 - Adjournment of payment of costs on day, Ord. 35, p. 1723
 - Allowance of plea or demurrer, Ord. 31, p. 1722
 - Amendment of bill, Ord. 29, p. 1721
 - Bill of costs and proceedings thereon, Ord. 76, p. 1731
 - Certificate of master, Ord. 55, p. 1727
 - Deductions from, Ord. 28-30, pp. 1721, 1722
 - Establishing debt before master, Ord. 47, p. 1760
 - In cause or against parties personally, Ord. 23, p. 1739
 - Insufficiency of answer, Ord. 28, p. 1721
 - Neglect of counsel, Ord. 36, p. 1723

[References are to pages.]

ENGLISH ORDERS IN CHANCERY — *continued*

Synopsis — continued

Costs — continued

Overruling of plea or demurrer, Ord. 32, p. 1722

Second setting down for hearing, Ord. 34, p. 1722

Two counsel for same party, Ord. 33, p. 1722

Cross bill for discovery only, answer to, Ord. 42, p. 1759

Cross bill for discovery only, costs of, Ord. 41, p. 1759

Decision by master as to sufficiency of answer or examination, Ord. 74, p. 1781

Decree for account of personal estate, Ord. 45, p. 1760

Decrees and orders — forms of, Ord. 27, p. 1740

Dedimus to take plea, answer, or demurrer, Ord. 9, p. 1735

Default — decree absolute, Ord. 44, p. 1760

Demurrer — grounds insufficient for overruling, Ord. 36, 37, p. 1758

Demurrer — time for setting down for argument, Ord. 34, p. 1758

Deposit of funds, securities, and effects, Ord. 28, p. 1740

Deposit on exceptions to master's report, Ord. 41, p. 1724

Deposits on petition of appeal or rehearing, Ord. 42, p. 1724

Direction of clerical and accidental errors, Ord. 45, p. 1725

Dismissal for want of prosecution, Ord. 16, 17, pp. 1718, 1719; Ord. 26, p. 1740

Elegit:

Delivery and execution, Ord. 3, p. 1748

Fees of clerk and solicitor, Ord. 6, p. 1749

Indorsement, Ord. 5, p. 1748

Time for issuance, Ord. 1, p. 1747; Ord. 2, p. 1748

Entry book of master, Ord. 24, p. 1739

Entry of appearance on defendant's failure to appear, Ord. 8, p. 1751

Evidence before master after issuing warrant, Ord. 67, p. 1729

Examination of creditors and other claimants by master, Ord. 72, p. 1730

Examination of witnesses orally by master, Ord. 69, p. 1730

Exceptions to answer, reference of, Ord. 5-9, pp. 1715, 1716

Exceptions to answer, time for delivering, Ord. 4, p. 1715

Exhibits, proof of, Ord. 43, p. 1760

Expedition of reference, Ord. 48, p. 1725

Fees:

Attendance of clerks in court, Ord. 37, p. 1723

Certificate as to state of cause, Ord. 43, p. 1724

Certificate of abatement or compromise, Ord. 39, p. 1723

Certificate of second setting down, Ord. 38, p. 1723

Schedule of fees of master, registrars, and clerks, Ord. 34, p. 1745

Fieri facias:

Delivery and execution, Ord. 3, p. 1748

Fees of clerk and solicitor, Ord. 6, p. 1749

Indorsement, Ord. 5, p. 1748

Return, Ord. 4, p. 1748

Time for issuance, Ord. 1, p. 1747; Ord. 2, p. 1748

Foreclosure causes — advancement for hearing, Ord. 4, p. 1746

[References are to pages.]

ENGLISH ORDERS IN CHANCERY — continued

Synopsis — continued

- Funds and securities, Ord. 28, p. 1740
- Interest after decree, Ord. 46, p. 1760
- Interrogatories in bill:
 - Division, numbering, etc., Ord. 17, p. 1753
 - Duty of defendant to answer, Ord. 16, p. 1753
 - Last interrogatory, Ord. 32, p. 1744
 - Note at foot of bill, Ord. 17, p. 1753; Ord. 18, p. 1754
 - Right to refuse to answer, Ord. 38, p. 1758
 - Words preceding interrogatories, Ord. 19, p. 1754
- Investments, Ord. 28, p. 1740
- Master extraordinary — territorial limit of jurisdiction, Ord. 83, p. 1744
- Master of reports and entries, Ord. 36, p. 1743
- Master's right to proceed *ex parte*, Ord. 53, p. 1728
- Money, deposit of, etc., Ord. 28, p. 1740
- Note of plaintiff's intention to proceed without answer, Ord. 21, p. 1754; Ord. 22, p. 1755; Ord. 33, p. 1757
- Office copies, Ord. 31, p. 1744
- Offices of court, when open, Ord. 35, 36, p. 1745
- Order book at rolls, Ord. 39, p. 1742
- Order for injunction for want of answer, Ord. 11, p. 1736
- Order for leave to amend bill, Ord. 13-15, pp. 1717, 1718
- Orders requiring affirmative acts — contents and indorsement, Ord. 12, p. 1752
- Parties — procedure on defect of parties, Ord. 39, 40, p. 1759
- Parties to various suits, Ord. 30-32, p. 1757
- Patentee of subpoena office, when office open, Ord. 38, p. 1745
- Payment of dividends and annuities, Ord. 28, p. 1740
- Plea — grounds insufficient for overruling, Ord. 36, 37, p. 1758
- Plea — time for setting down for argument, Ord. 35, p. 1758
- Proceeding by master *de die in diem*, Ord. 58, p. 1727
- Process to compel obedience to order to pay money, Ord. 11, p. 1752
- Process to enforce obedience on behalf of persons not parties, Ord. 15, p. 1753
- Production of documents before master, Ord. 60, p. 1728
- Production of witness at seat of clerk, Ord. 25, p. 1721
- Prosecutor before master, Ord. 56, p. 1727
- Publication, enlargement of, Ord. 18, p. 1720
- Receiver's accounts, time for delivering, Ord. 63, p. 1728
- Receivers of landed estate, Ord. 64, p. 1729
- Record of proceedings before master, Ord. 49, p. 1725
- Reference of exceptions to answer, Ord. 5-9, pp. 1715, 1716
- Reference to masters in rotation, Ord. 15-17, pp. 1736, 1737
- Registrar — attendance at courts in succession, Ord. 26, p. 1740
- Report of master — recitals in, Ord. 48, p. 1760
- Review of *ex parte* proceedings before master, Ord. 54, p. 1726
- Review of proceedings in master's office, Ord. 68, p. 1729
- Right of examiner in chief of taking cross-examination, Ord. 26, p. 1721

[References are to pages.]

ENGLISH ORDERS IN CHANCERY — *continued*

Synopsis — continued

- Sale of property by master, Ord. 75, p. 1731
Scandal and impertinence, order of reference for, Ord. 11, 12, p. 1717
Secretary of master of rolls, duties and fees, Ord. 39, p. 1742
Securities, deposit, apportionment, etc., Ord. 28, p. 1740
Security to answer costs, Ord. 40, p. 1724
Separate answers by one solicitor for two or more defendants, Ord. 27, p. 1721
Separate reports by master, Ord. 70, 71, p. 1730
Sequestration on defendant's failure to answer, Ord. 9, p. 1751
Service of notice or competition, Ord. 22, 23, p. 1720
Service on clerk of court, Ord. 20, 21, p. 1720
Service on solicitor of person not party, Ord. 44, p. 1724
Settlement of conveyances — draft and proceedings, Ord. 76, p. 1731
Settling time for proceedings before master, Ord. 50-52, p. 1726
Simultaneous suits — election between courts, Ord. 1, p. 1745
Solicitor's book, Ord. 1-5, pp. 1749, 1750
Solicitors for separate parties, Ord. 77, p. 1731
Special application for leave to withdraw replication or amend bill, Ord. 20, p. 1738
Striking out improper matter by master, Ord. 73, p. 1730
Striking out scandalous or impertinent matter — costs, Ord. 22, p. 1738
Subpoena:
 Costs and fees, Ord. 5, p. 1733
 Country and town causes, Ord. 1, p. 1715
 For each defendant, Ord. 2, p. 1715
 Indorsement, Ord. 3, p. 1733
 Memorandum at foot of writ, Ord. 14, p. 1752
 Names included in, Ord. 5, p. 1733; Ord. 6, p. 1734
 Praecept, Ord. 2, p. 1733
 Preparation and sealing, Ord. 1, p. 1733
 Service, Ord. 4, p. 1733; Ord. 7, p. 1734
Supplemental bill — recitals of pleadings in, Ord. 49, p. 1761
Time of setting down for hearing, Ord. 82, p. 1732
Time of taking effect of orders, Ord. 78-82, p. 1732; Ord. 51, p. 1761
Time to plead after amendment, Ord. 14, p. 1736
Time to plead, answer, or demur, Ord. 10, p. 1735; Ord. 12, 13, p. 1736
Time to plead — country cases, Ord. 20, p. 1754
Time to put in further answer, Ord. 18, p. 1737
Trust estates — parties to suits, Ord. 30, p. 1757
Venditioni eponas, fees of clerk and solicitor, Ord. 6, p. 1749
Venditioni eponas, issuance of, Ord. 4, p. 1748
Writ for compelling obedience to process, order, or decree, Ord. 7, p. 1751
Writ of assistance, Ord. 13, p. 1752
Writ of execution to compel obedience, Ord. 10, p. 1752
Writ of rebellion to compel obedience, Ord. 6, p. 1751

ENROLLMENT OF DECREE:

See **DECREE**

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

ENTRY OF DECREE:

See **DECREE**

ENVELOPE:

Certificate on envelope enclosing deposition, 1813

EQUITABLE DEFENSE IN ACTION AT LAW:

Ancillary proceedings, 1235

Separation of law and equity, 14-17

EQUITABLE TITLE:

Availability at law, 17

EQUITY:

Adaptation to settlement of complicated causes, 396

Circuit court principal forum, 4

Determination of whole controversy, 397, 407, 408

Offer of, 216, 217

Separation of law and equity, see **SEPARATION OF LAW AND EQUITY**

EQUITY JURISDICTION (see also **JURISDICTION**):

Accounts and accounting, 64, 65

Circuit Court generally, 2, 321

Comity and policy, 25

Contracts, 37, 51-53

Co-ordinate branch of government, jurisdiction over, 35

Creditors' bills, 68, 69

Defense at law as affecting, 183

Discovery, effect of right of, 58

District court, 3

Ejectment, 60

Equitable title to legal right of action, 57

Extent of, in general, 32

Forfeitures, 36

Origin of in federal courts, 1, 2

Partition, 70

Patents, suits to protect, 77

Penalties, 36

Political rights, enforcement of, 33, 34

Promise for benefit of stranger, 54

Public interest as affecting, 75

Quieting title, 61

Rates charged by public corporations, 74, 75, 76

Remedy at law, exclusion by, 38

Separate estate of married woman, protection of, 56

State statutes, effect of, 23, 315

Stranger, promise for benefit of, 54

Suit by legatee against executor, 55

INDEX.

1981

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

EQUITY JURISDICTION — continued

- Supreme Court, origin of equity jurisdiction in, 2
- Tax law, enjoining enforcement of, 72, 73
- Title to equitable relief, 52
- Tort actions, 52
- Trespass, 59
- Uniformity in various states, 22

EQUITY OF REDEMPTION:

- Foreclosure of mortgage, 2857, 2873

EQUITY RULES OF SUPREME COURT:

- District of Columbia, applicability in, 112
- Origin of, 109
- Time of taking effect, 109

[The equity rules will be found collected in the Appendix to Volume III, pp. 1665-1694. For convenience of reference a brief synopsis of the rules is given here, and citations of particular rules throughout the body of the work are also noted. For particular applications of the rules, see specific headings throughout the general index.]

SYNOPSIS OF RULES.

Amendment of bills, Rules 28-30, p. 1673

Answer:

- Amendment, Rules 45, 46, p. 1678
- Answer as evidence, Rule 41, p. 1677 (amendment)
- Answer, demurrer, and plea to same bill, Rule 32, p. 1674
- Costs for separate answer by same solicitor, Rule 62, p. 1683
- Discovery by answer generally, Rule 39, p. 1675
- Exceptions to answers, see *infra*, Exceptions to answer
- Interrogatories requiring answer, Rule 41, p. 1678
- Officer before whom oath may be taken, Rule 59, p. 1682
- Refusal to answer demurrable matters, Rule 44, p. 1678
- Special interrogatories, Rule 40, p. 1676
- Time for amendment, Rule 60, p. 1682
- Time for filing new or supplemental answer, Rule 46, p. 1678

Appearance of defendant, Rule 17, p. 1669

Applications grantable of course, Rule 5, p. 1666

Assistance, writ of, Rules 7, 9, p. 1667

Bill:

- Amendment, Rules 28-30, p. 1673
- Averments as to parties, Rule 22, p. 1671
- Charging part, Rule 21, p. 671
- Common confederacy clause, Rule 21, p. 1670
- Costs for bill and answer, Rule 25, p. 1672
- Division and numbering of interrogatories, Rule 41, p. 1676
- Introduction to interrogatories, Rule 43, p. 1677

[References are to pages.]

EQUITY RULES OF SUPREME COURT — continued

Synopsis — continued

Bill — continued

Introductory part, Rule 20, p. 1670

Jurisdiction clause, Rule 21, p. 1671

Narrative or stating part, Rule 21, p. 1671

Notes specifying interrogatories to be answered, Rule 42, p. 1677

Option to omit certain parts, Rule 21, p. 1670

Prayer for process, Rule 23, p. 1671

Prayer for relief, Rule 21, p. 1671

Scandal and impertinence, Rules 26, 27, p. 1672

Signature of counsel, Rule 24, p. 1671

Bills of revivor, Rules 56, 57, p. 1681; Rule 58, p. 1682

Certificate of counsel to demur or plead, Rule 31, p. 1674

Chambers, powers of judge at, Rule 3, p. 1665

Charging part of bill, Rule 21, p. 1671

Circuit courts always open for certain purposes, Rule 1, p. 1665

Circuit judge, powers at chambers, Rule 3, p. 1665

Clerk, attendance at office for certain purposes, Rule 2, p. 1665

Clerk, motions and applications grantable of course by, Rule 5, p. 1666

Clerk's office, when open for motion, etc., Rule 2, p. 1665

Commission to take testimony, Rule 67, p. 1684

Common confederacy clause of bill, Rule 21, p. 1670

Costs on allowing demurrer or plea, Rule 35, p. 1675

Costs on overruling demurrer or plea, Rule 34, p. 1674

Costs taxable for bill and answer, Rule 25, p. 1672

Cross bill, Rule 72, p. 1688

Decree:

Affirmation in lieu of oath, Rule 91, p. 1693

Circuit courts, power to make additional rules, Rule 89, p. 1693

Correction of errors, Rule 85, p. 1692

English chancery practice adopted in absence of rule, Rule 90, p. 1693

Foreclosure of mortgage, Rule 92, p. 1693

Form and recitals, Rule 86, p. 1692

Guardians, Rule 87, p. 1692

Injunctions, Rule 93, p. 1694

Next friend, Rule 87, p. 1692

Prochein ami, Rule 87, p. 1692

Pro confesso, Rule 19, p. 1670

Rehearing, Rule 88, p. 1692

Demurrer:

Admissions by failure to set down for argument, Rule 38, p. 1675

Certificate of counsel, Rule 31, p. 1674

Costs on overruling, Rule 34, p. 1674

Costs on sustaining, Rule 35, p. 1675

Demurrer, plea, and answer to same bill, Rule 32, p. 1674

Grounds insufficient for overruling, Rules 36, 37, p. 1675

Setting down for argument, Rule 33, p. 1674

Depositions, Rule 67, p. 1684; Rule 68, p. 1686

[References are to pages.]

EQUITY RULES OF SUPREME COURT — *continued*

Synopsis — continued

- Entry of suit on docket, Rule 16, p. 1669
Examination of witnesses, Rule 67, p. 1684; Rule 68, p. 1686
Examiners of court, Rule 67, p. 1684
Exceptions to answer:
 Costs for separate answers, Rule 62, p. 1683
 Effect of allowance, Rule 64, p. 1683
 Effect of overruling, Rule 65, p. 1684
 Setting down for hearing, Rule 63, p. 1683
 Time for filing exceptions, Rule 61, p. 1682
Exceptions to master's report, Rules 83, 84, p. 1691
Filing amendments, Rule 30, p. 1673
Final process, Rule 8, p. 1667
Frame of bills generally, Rules 20–25, pp. 1670–1672
Interrogatories for taking testimony, Rule 67, p. 1684; Rule 71, p. 1687
Issue on filing replication, Rule 66, p. 1684
Judge of circuit court, powers at chambers, Rule 3, p. 1685
Jurisdiction clause of bill, Rule 21, p. 1671
Mesne process, Rule 7, p. 1667
Motions grantable of course, Rule 5, p. 1666
Motions, time of making and hearing, Rule 6, p. 1666
Narrative part of bill, Rule 21, p. 1671
Nominal parties, Rules 54, 55, p. 1680
Notice by entry in order book, Rule 4, p. 1666
Notice of taking testimony, Rule 67, p. 1684; Rule 68, p. 1686
Order book, Rules 4, 6, p. 1666
Parties:
 Allegations in bill as to, Rule 22, p. 1671
 Decree saving rights of absent parties, Rule 47, p. 1678; Rule 48, p. 1678; Rule 53, p. 1680
 Dispensing with joinder of certain proper parties, Rule 47, p. 1678;
 Rule 48, p. 1679
 Heir at law, Rule 50, p. 1679
 Nominal parties, Rules 54, 55, p. 1680
 Persons jointly and severally liable, Rule 51, p. 1679
 Setting down for argument for want of parties, Rule 52, p. 1680
 Trustees of real estate, Rule 49, p. 1679
Plea:
 Admissions by failure to reply or set down for argument, Rule 28, p. 1675
 Certificate of counsel, Rule 31, p. 1674
 Costs on overruling, Rule 34, p. 1674
 Costs on sustaining, Rule 35, p. 1675
 Grounds insufficient for overruling, Rules 36, 37, p. 1675
 Issue or setting down for argument, Rule 33, p. 1674
 Plea, demurrer, and answer to same bill, Rule 32, p. 1674
Prayer for process, Rule 23, p. 1671
Prayer for relief, Rule 21, p. 1671

[References are to pages.]

EQUITY RULES OF SUPREME COURT — *continued*

Synopsis — continued

Proceedings before master, see *infra*, Reference to master

Process for and against persons not parties, Rule 10, p. 1667

Process generally, Rules 7-10, p. 1667

Process to enforce decree, Rule 10, p. 1667

Process to execute decree or order, Rule 7, p. 1667

Process to require appearance and answer, Rule 7, p. 1667

Pro confesso, Rules 18, 19, pp. 1669, 1670

Reference to master:

Accounting before master, Rule 79, p. 1690

Compensation of master, Rule 82, p. 1691

Contempt by witnesses, Rule 78, p. 1690

Direction of decree for account of personal estate, Rule 73, p. 1688

Documentary evidence, Rule 80, p. 1690

Exceptions to master's report, Rules 83, 84, p. 1691

Mode of examination of claimant, Rule 81, p. 1690

Power of master to regulate proceedings, Rule 77, p. 1689

Procuring attendance of witnesses, Rule 78, p. 1690

Recitals in master's report, Rule 78, p. 1689

Standing masters and masters *pro hac vice*, Rule 82, p. 1691

Time and place for proceedings, Rules 74, 75, p. 1688

Replication:

General replication and joinder of issue, Rule 66, p. 1684

Special replication to answer, Rule 45, p. 1678

Scandal and impertinence in bills, Rules 26, 27, p. 1672

Service of process generally, Rules 11-16, pp. 1668, 1669

Stating part of bill, Rule 21, p. 1671

Stockholders' bills against corporations, Rule 94, p. 1694

Subpoena:

Issuance of, Rules 11, 12, p. 1668

Return not executed, Rule 14, p. 1668

Service of, Rule 13, p. 1668

Supplemental bills, Rules 56, 57, p. 1681; Rule 58, p. 1682

Taking bill *pro confesso*, Rules 18, 19, pp. 1669, 1670

Testimony *de bene esse*, Rule 70, p. 1687

Testimony, how taken, Rule 67, p. 1684; Rule 68, p. 1686

Time for taking testimony, Rule 69, p. 1687

Time to plead, Rule 18, p. 1669

PARTICULAR RULES.

[References are to sections.]

Rule 1: 665, 1260, 1264

Rule 2: 567, 1263, 1264

Rule 3: 665, 681, 1270

Rule 4: 876, 957, 1269, 1275

Rule 5: 1261, 1290

Rule 6: 1268, 1280

Rule 7: 271, 583, 663, 667, 674, 2217

Rule 8: 2198, 2204, 2206, 2214

INDEX.

1985

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

EQUITY RULES OF SUPREME COURT — *continued*

Particular Rules — continued

Rule 9: 2217

Rule 10: 2220, 2221

Rule 11: 587

Rule 12: 272, 586, 588, 589, 590, 602, 678, 1552

Rule 13: 596, 605

Rule 14: 592

Rule 15: 594, 603

Rule 16: 580, 602

Rule 17: 640, 644, 646

Rule 18: 678, 681, 871, 958, 1133, 1428, 1552, 1558, 1559, 1563, 1570

Rule 19: 1559, 1563, 1566, 1571, 1572, 2079

Rule 20: 165, 306, 328

Rule 21: 214, 215, 218, 229, 232, 242, 791, 950, 2270, 2547

Rule 22: 272, 530

Rule 23: 238, 272, 273, 487, 2303

Rule 24: 298, 300, 565

Rule 26: 277, 280, 297, 1988

Rule 27: 294, 297, 756, 758, 760, 761, 775

Rule 28: 301, 1079, 1104, 1107, 1130, 1154, 1988

Rule 29: 807, 1078, 1083, 1106, 1107, 1113, 1154, 1988

Rule 30: 1079, 1114, 1154

Rule 31: 831, 863, 864, 868, 875, 954, 955

Rule 32: 843, 992, 993

Rule 33: 883, 894, 898, 900, 904, 907, 909, 961

Rule 34: 885, 886, 903, 905, 906, 907, 911, 968, 1552, 1988

Rule 35: 966, 1118, 1988

Rule 37: 977, 978, 994

Rule 38: 870, 872, 876, 891, 961, 1977

Rule 39: 373, 729, 830, 849, 887, 1009, 1010, 1011, 1012, 1013, 1014

Rule 40: 236, 785

Rule 41: 236, 238, 275, 701, 707, 708, 738, 784, 1003, 2410, 2556

Rule 43: 236, 238

Rule 44: 735

Rule 45: 231, 791, 1079, 1093

Rule 46: 1079, 1132, 1133, 1552

Rule 47: 530, 532, 533, 534, 550

Rule 48: 540, 545, 550, 551, 552, 2457

Rule 52: 754, 755, 835, 846

Rule 54: 1988

Rule 55: 1280, 2292, 2294, 2295, 2300

Rule 56: 611, 1214

Rule 57: 1182, 1195

Rule 58: 1188

Rule 59: 704

Rule 60: 819, 1079, 1145, 1164

Rule 61: 775, 776

Eq. Prac. Vol. III.—125.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

EQUITY RULES OF SUPREME COURT—*continued*

- Rule 62: 1988, 2031
Rule 63: 297, 779, 1926
Rule 64: 782, 1552
Rule 66: 793, 800, 802, 813
Rule 67: 1624, 1626, 1627, 1630, 1631, 1665, 1666, 1668, 1673, 1684, 1688,
1689, 1690, 1691, 1695, 1697, 1708, 1711, 1712, 1717, 1740, 1840
Rule 68: 1717, 1721, 1723, 1724, 1781
Rule 69: 1410, 1439, 1656, 1754, 1755
Rule 70: 1717, 1777, 1778, 1780, 1784, 1788, 1789
Rule 71: 1703
Rule 72: 1059, 1067, 1868
Rule 73: 1415, 1462, 1479
Rule 74: 1418
Rule 75: 1419, 1426
Rule 76: 1458
Rule 77: 1419, 1434, 1436, 1444, 1461, 1631, 1896
Rule 78: 1436, 1627, 1673, 1691, 1839, 1840
Rule 79: 1430
Rule 80: 1434
Rule 81: 1436
Rule 82: 1389, 1390, 1463, 1467, 2205
Rule 83: 1463, 1479, 1483, 1484, 1501, 2730
Rule 84: 1988
Rule 85: 1977, 2065
Rule 86: 1963
Rule 87: 454
Rule 88: 2088, 2089, 2117
Rule 89: 1988
Rule 90: 97, 119, 588
Rule 91: 705
Rule 92: 127, 248, 2887, 2893
Rule 94: 437, 469, 472, 475, 477

ESTOPPEL:

- Accounting by receiver, 2723
Allegations explanatory of, 213, 214
Avoidance of, how pleaded in bill, 214
Defense at law, 82
Demurrer for equitable estoppel, 941
Laches, 214
Objections to receivers' certificates, 2763, 2768
Of plaintiff to question jurisdiction, 92
Purchaser at receiver's sale, 2857
Remedy at law available by estoppel, 92

EVIDENCE:

- Absolute proof, 1632

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

EVIDENCE — continued

- Admissibility of evidence in original suit after revivor, 1222
- Admissions, see **ADMISSIONS**
- Affidavits, see **AFFIDAVITS**
- Allegation of facts as evidence, 739, 740
- Answer as evidence:
 - Accounts and accounting, 1609
 - Admissions, see **ADMISSIONS**
 - Allegation of facts, 739, 740
 - Against codefendant, 1598, 1599
 - Answer in support of plea, 995
 - Answer of infant, 1590
 - Clauses of charge and discharge, 1595
 - Defense of innocent purchase, 1607
- For defendant:
 - Answer based on ignorance or information, 1604
 - Answer of corporation, 1605
 - Consideration of answer as a whole, 1613
 - Denial of material fact alleged in bill, 1606
 - Effect of bill waiving oath in general, 1600
 - Evasive or equivocal answer, 1604
 - Hearing on bill and answer, 816, 823
 - Hearsay statements, 1604
 - Inference from silence, 1613
 - Maxim *falsus in uno falsus in omnibus*, 1614
 - Negative averments, 1604
 - New York doctrine, 1611
 - Partial waiver of oath, 1603
 - Qualification of defendant's right, 1604
 - Responsiveness of answer, 1602, 1604, 1606-1611
 - Sworn answer — American doctrine, 1602
 - Sworn answer — orthodox rule, 1601
 - Weight of answer as evidence, 1612
- For plaintiff:
 - Admissibility in general, 1587
 - Admissions of allegations of bill, 1606
 - Whole or part of answer, 1591, 1592
- Matter in avoidance of case made in bill, 1606, 1607, 1609
- Partner's answer as evidence against copartner, 1599
- Requirement as to actual reading of answer, 1496
- Rule requiring two witnesses:
 - Application in chancery cases, 1616
 - History of rule, 1615
 - One witness and corroborating circumstances, 1617
 - Relation of rule to view that answer is evidence for defendant, 1618
- Whole or part of answer, 1591, 1592
- Bill as evidence:
 - Admissibility in favor of plaintiff, 1582

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

EVIDENCE — continued

Bill as evidence — continued

Admissibility of bill in explanation of answer, 1597

Admissions conclusive against plaintiff, 1583

Admissions of amended bill, 1584

Bill taken *pro confesso*, 1582

Common-law rule as to use in another suit, 1585

Equity rule as to use in another suit, 1586

Use of bill as affidavit, 1582

Burden of proof, see BURDEN OF PROOF

Comparison of practice of courts of law and of equity, 1619, 1620

Competency of witnesses, see WITNESSES

Conditional proof, 1632

Conformity to issues:

Allegation of pleadings, 1577

Irrelevant allegations, 1578

Consolidated causes, 1516

Contempt proceedings, see CONTEMPT

Costs where evidence unnecessarily taken, 2006

Cross-examination of witnesses, see CROSS-EXAMINATION

Demurrer to evidence unknown in equity, 917

Depositions, see DEPOSITIONS

Discovery, see DISCOVERY

Documentary, see DOCUMENTS; PRODUCTION OF DOCUMENTS; SUBPOENA DUCES TECUM

English practice as to taking proof, 1634-1646

Examination before examiner of court, see EXAMINER OF COURT; PROCEEDINGS BEFORE EXAMINER

Exclusion at hearing, 1981

Exhibits, see EXHIBITS

Extension of time for taking, see *def'res*, Time for taking

General principles, 1576-1581

Injunction cases, see INJUNCTIONS

Issue made by supplemental bill, 1200

Issues to jury, see ISSUES TO JURY

Judiciary Act, 1620

Methods of taking:

Generally, 1717

In federal courts, 1665

Modes of proof in general, 1619, 1620

Motion to dissolve or modify injunction, 2402

Necessity for proof, 1576

New or newly discovered evidence:

Bill of review, see BILL OF REVIEW

Rehearing, see REHEARING

Oral testimony:

Before examiner, 1627, 1631, 1666

Before master in chancery, 1631

Bill of exceptions, 1630

INDEX.

1989

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

EVIDENCE — continued

Oral testimony — continued

- Discretion of court, 1628
- Early statutes, 1625
- Equity rules, 1626, 1627
- Exhibits, see **EXHIBITS**
- Incorporation of oral testimony in record, 1629, 1630
- Judiciary Act, 1620, 1625
- Late statutes, 1628
- Oral or written evidence generally, 1619, 1620
- Part of evidence oral and part on deposition, 1670
- Practice of equity courts generally, 1620
- Present practice, 1627
- Summary of law, 1631
- Perpetuation of testimony, see **PERPETUATION OF TESTIMONY**
- Plea as evidence, 897
- Pleading evidence unnecessary, 179
- Printing, cost of, 1989
- Privileged communications, see **PRIVILEGED COMMUNICATIONS**
- Production of documents, see **PRODUCTION OF DOCUMENTS; SUBPOENA DUCES TECUM**
- Publication of testimony, see **PUBLICATION OF TESTIMONY**
- Referee in bankruptcy, testimony before, 1679
- Reference, evidence on, see **REFERENCE**
- Rehearing on new or newly discovered evidence, see **REHEARING**
- Scope as determined by pleadings, 1577, 1578
- Subpoena *duces tecum*, see **SUBPOENA DUCES TECUM**
- Supplying defects at hearing, see **HEARING**
- Testimony *de bene esse*, 1632, 1633, 1777
- Time for taking:
 - Effect of order for publication of testimony, 1753, 1763, 1764
 - Equity rule, 1656
 - Evidence in chief, 1658
 - Evidence in rebuttal, 1656
 - Evidence in surrebuttal, 1660
 - Extension of time:
 - Application, contents of, 1661
 - Considerations affecting propriety, 1658
 - Discretion of court, 1657
 - Effect of refusal to extend time, 1652
 - Expert testimony, 1659
 - Second extension, 1658
 - Objection to testimony taken out of time, 1663, 1664
 - Waiver of objection, 1663
- Transactions with deceased persons, 1650
- Trial of issues by jury, see **ISSUES TO JURY**
- Trial on plea and replication:
 - Manner of taking proof, 895
 - Plea as evidence, 897

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

EXAMINATION OF WITNESSES:

See **CROSS-EXAMINATION; DEPOSITIONS; EVIDENCE; PERPETUATION OF TESTIMONY; PROCEEDINGS BEFORE EXAMINER**

EXAMINER OF COURT (see also PROCEEDINGS BEFORE EXAMINER):

Appointment, 1667
Authority to administer oath under English practice, 1635
Discretion of court as to appointment, 1669
English practice generally, 1634-1638
General examiner, 1667
Office and duties under English practice, 1635
Payment of fees, 1689
Power of circuit court to appoint, 1667
Power to rule on propriety of questions and answers, 1675, 1678
Power to take evidence beyond district, 1668, 1669
Proceedings before, see **PROCEEDINGS BEFORE EXAMINER**
Special examiner, 1667
Standing examiner, 1667

EXCEPTIONS:

Forms relating to, see **FORMS**
For scandal and impertinence, see **SCANDAL AND IMPERTINENCE**
Testing legal sufficiency of defense on hearing, 810
To answer, see **ANSWER**
To deposition, see **DEPOSITION**
To taxation of costs, 2055

EXCOMMUNICATED PERSONS:

Capacity to sue, 448

EXECUTION:

Cumulative remedy, 2204
English chancery court, 2197
Federal courts, 2198
Levy of writ, 2199
Property in hands of receiver, 2602
Return of writ, 2199
Writ of execution of decree:
 Contempt process for disobedience, 2212
 Contents, 2210
 Federal practice, 2214
 Nature of writ, 2209
 Sequestration, 2212
 Service, 2211, 2213

EXECUTORS AND ADMINISTRATORS:

Citizenship of administrator, allegation of, 327
Costs, 1997, 2041

INDEX.

1991

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

EXECUTORS AND ADMINISTRATORS — *continued*

- Foreign, capacity to sue, 452
- Formal or nominal party, 538
- Jurisdiction of suit against executor by legatee, 55
- Nec execut* against, 2262
- Plea denying representative capacity, 838
- Reimbursement for costs, 2041
- Supplemental bill to bring in successor, 1177

EXHIBITS:

- Admissibility as evidence, 1807
- Amounting to amendment, 1084
- Best evidence of contents of document, 283
- Certification, 1808, 1809
- Copies as exhibits, 1808
- Identification, 1807
- Incorporation of another bill as exhibit, 282
- Motion to compel exhibit amounting to amendment, 1084
- Part of bill, 281
- Proof:
 - Deeds, 1621
 - Letters, 1621
- Oral proof:
 - Equity rule, 1624
 - Leave of court, 1622
 - Limitation on right, 1623
 - Practice of federal court, 1624
 - Propriety of, 1621
- Return, 1809
- To answer, 709
- Unnecessary if contents pleaded, 280

EXPERT TESTIMONY:

- Extension of time for taking, 1659

FACTS:

- Manner of pleading, 739

FEDERAL COURTS:

- Nature of, as equity courts, 21
- Origin of equity jurisdiction, 1, 2
- State laws, effect and applications of, see STATE LAWS

FEDERAL QUESTION:

- Amendment, 1087
- Anticipating defenses, 320
- Circuit court, jurisdiction where federal question involved, 321
- Facts to be clearly shown, 319

References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2224; III, §§ 2225-2307.

FEDERAL QUESTION — *continued*

- General averment insufficient, 318
- Manner of pleading on removal of cause, 323, 328
- Meaning of term, 316
- Necessity for stating in plaintiff's pleading, 317
- Necessity to plaintiff's case must appear, 320

FEES:

- Costs, see COSTS
- Counsel fees in receivership cases, 2726-2728, 2737
- Docket fees, 1990
- Statutory fees and costs in federal courts, 1987

FINDINGS:

- Issues to jury, see ISSUES TO JURY
- Weight of master's findings on reference, see REFERENCES

FINE:

- Contempt proceedings, see CONTEMPT

FORECLOSURE:

- Acceleration of maturity of debt:
 - Allegations in bill, 2843
 - Construction of accelerating clause, 2829
 - Default in payment of interest, 2826
 - Demand in writing, 2827
 - Discretion of trustee, 2828
 - Extension of time, 2831
 - Necessity of express provision, 2826
 - Time for exercising option, 2830
 - Transfer of right to purchaser, 2896
- Amendment of decree, 2865
- Appealability of decree, 1938
- Application of proceeds of sale:
 - Claims of subordinate lienholders, 2883
 - Claims sharing equally in proceeds, 2876-2878
 - Distribution subject to prior liens and equities, 2879
 - Form of decree, see FORMS
 - Interest coupons, 2877
 - Payment of part of debt not due, 2882
 - Payment of residue to mortgagor, 2885
- Priorities and distribution:
 - Assignee of prior claim, 2879
 - Claims of subordinate lien holders, 2883
 - In general, 2879
 - Interest coupons, 2877
 - Purchaser taking subject to existing liens, 2881
 - Right of first mortgagee, 2880

INDEX.

1993

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

FORECLOSURE — *continued*

Application of proceeds of sale — *continued*

Priorities and distribution — *continued*

Waiver of priority, 2884

Property incapable of division, 2882

Reference to determine application, 2883

Series of bonds irregularly issued, 2878

Statutory provisions, 2875

Stipulation of parties, 2874

Terms of mortgage as governing distribution, 2874

Bill:

Allegations:

Allegations to accelerate maturity of debt, 2843

Amount due and unpaid, 2840

Amount secured by mortgage, 2840

Demand of payment, 2845

Description of premises, 2840

Interest coupons, 2841

Nature and extent of relief asked, 2840

Negativing proviso of mortgage, 2844

Ownership of bond and coupons, 2842

Request by required number of bondholders, 2822

Right of plaintiff to maintain suit, 2840

Sufficiency to support deficiency decree, 2894

Terms and conditions of mortgage, 2840

Unnecessary allegations, 2843-2845

Contents of bill generally, 2840

Multifariousness in bill, 2839

Prayer for deficiency decree, 2896

Second bill on failure of first foreclosure, 2872

Separate bills to foreclose single mortgage, 2837

Bona fide purchase as defense to suit, 2852

Bondholders, right of to maintain independent suit, 2837

Conditions precedent:

Breach of condition of mortgage, 2825

Default in payment, 2825

Demand in writing, 2827

Request in writing for institution of suit, 2834

Request of bondholder, 2822

Confirmation of sale:

Determination of propriety of confirmation, 2897

Forms relating to, see **Forms**

Necessity notwithstanding state statute, 2818

Objections to original decree at confirmation, 2867

Consolidation of foreclosure suit and creditor's bill, 1813

Consolidation of suits by trustee and beneficiary, 2837

Costs and expenses of sale, 2885

Costs, reimbursement in railroad foreclosures, 2047

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2235-2897.]

FORECLOSURE — *continued*

Cross bill, 1034

Cumulative remedies, 2815

Decree:

Amendment of decree, 2865

Appealability, 1938

Ascertainment of indebtedness, costs, expenses, and priorities, 2857

Barring right of redemption, 2873

Construction, 2866

Deficiency decree, see *infra*, Deficiency decree

Form of decree in first instance, 2856

Maturity of debt as affecting, 2858, 2859

Modification of decree, 2865

Objections to decree of sale at confirmation, 2867

Order *nisi*, 2856

Prerequisites to making decree, 2857

Provisions as to redemption, 2873

Sale of whole or part of property, 2858-2861

Defenses to suit:

Authority of corporate officers, 2853

Defenses good against action for debt, 2846

Failure to make presentation of note, 2853

Fraud, 2851

Hostility of parties, 2853

Innocent purchase, 2852

Laches, 2849

Mortgage as incident of secured debt, 2846

Presumption of payment from lapse of time, 2850

Sale under power, 2853

Statute of limitations, 2847, 2848

Usury, 2853

Deficiency decree:

Action at law to recover deficiency, 2889

Against whom recoverable, 2891

Discretion of court, 2888

Effect of provision as to terms of sale, 2888

Equity rule, 2887, 2889, 2893

Interest on decree, 2897

Junior lienholder, 2890

Jurisdiction to enter, 2892, 2893

Matter of right, 2888

Maturity of debt as affecting right, 2894

Necessity of jurisdiction of person, 2892

Origin and history of practice, 2886

Persons entitled, 2890

Power of equity court to grant, 2886

Practice in federal courts, 2887

Prayer for decree, 2896

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.)

FORECLOSURE — *continued*

Deficiency decree — *continued*

Reversal on failure of foreclosure decree, 2893

State statutes, 2889

Statute of limitations, 2895

Discretion of court:

Deficiency decree, 2888

Postponement of sale, 2865

Discretion of trustee as to declaring debt due, 2828

Distribution of proceeds of sale, see *supra*, *Application of proceeds of sale*

Diversity of citizenship, jurisdiction dependent on, 2812

Ejectment under state statutes, 2814

Election between different methods, 2815

Equity of redemption, see *infra*, *Redemption*; *State statutes*

Existence of subject matter as affecting right, 2819

Forms relating to, see *FORMS*

Fraud:

Defense to foreclosure suit, 2851

Injunction where mortgage invalid, 2835

Interest on deficiency decree, 2897

Junior mortgagees:

Right to deficiency decree, 2890

Sale free from incumbrances, 2862

Jurisdiction:

Courts of equity in general, 2812

Diversity of citizenship, 2812

Enforcement of state remedy in federal court, 2814

Entry of deficiency decree, 2892, 2893

Existence of cumulative remedy, 2815

Federal courts generally, 2812

Pendency of suit in state court, 2816

Restriction tending to oust jurisdiction, 2823

State laws, effect of, 2813

Laches as defense to suit, 2849

Liens:

Exhaustion of lien where entire property sold, 2860

Preservation of lien where property sold in part, 2859

Prior mortgagee's lien on sale by junior mortgagee, 2862

Limitations, statute of, see *infra*, *Statute of limitations*

Maturity of debt:

Acceleration, see *supra*, *Acceleration of maturity of debt*

Effect on decree of sale, 2858, 2859

Effect on right to deficiency decree, 2894

Extension of time, 2831

Methods of foreclosure, 2854, 2855

Mortgage as incident of secured debt, 2846

Multifariousness in bill, 2839

Nature of foreclosure suit, 2811

Necessity in general, 2820

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

FORECLOSURE — *continued*

Object of proceedings, 2810

Order *nisi*, 2856

Petition *pro interessante suo*, 1368

Plea to bill to foreclose, 838

Prayer of bill, 2896

Prematurity of suit:

Six months' clause, 2832

Who may complain, 2833

Presumption of payment from lapse of time, 2850

Priorities and distribution of proceeds, see *supra*, Application of proceeds of sale

Proceedings incident to foreclosure suits generally, 2835-2845

Proceeds of sale, see *supra*, Application of proceeds of sale

Purchaser at sale:

Title of purchaser, 2873

Trustee as purchaser, 2864

Receivership, 2564, 2566

Redemption:

Right of redemption after sale complete, 2873

Right to redeem before sale, 2857

Reimbursement for costs in railroad foreclosures, 2047

Resale on failure to complete purchase, 2869

Right to foreclose:

Acceleration of maturity of debt, see *supra*, Acceleration of maturity of debt

Bondholder, 2837

Conditions affecting right generally, 2824

Conditions precedent, see *supra*, Conditions precedent

Creditor, 2837

Interpretation of restrictions, 2821

Mortgage security convertible bonds, 2824

Power to make calls on stockholders, 2824

Prematurity of suit, see *supra*, Prematurity of suit

Provision giving power of sale, 2824

Remedy favored in equity, 2821

Requests of bondholders as conditions precedent, 2822

Restrictions on right generally, 2821

Restrictions tending to oust jurisdiction, 2823

Sale:

Application of proceeds, see *supra*, Application of proceeds of sale

Bidding by trustee, 2864

Confirmation, see *supra*, Confirmation of sale

Decree of sale, see *supra*, Decree

Forms relating to, see FORMS

Inverse order of alienation, 2871

Jurisdiction of equity court to order, 2855

Liability of master for unauthorized sale, 2870

INDEX.

1987

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2235-2897.]

FORECLOSURE — continued

Sale — continued

Maturity of debt as affecting sale in whole or in part, 2858

Parcels or entirety, 2857-2861

Postponement, 2865

Preservation of lien where part of property sold, 2859

Property not divisible, 2860

Railroad property, 2861

Resale on failure to complete purchase, 2869

Right of trustee to purchase, 2864

Sale free from incumbrances, 2862

Sale to satisfy part of debt, 2859

Setting aside for inadequacy of price, 2868

Title of purchaser, 2873

Upset price, 2863

Whole or part of property, 2857-2861

Soire facias under state statutes, 2814

Scope of proceedings:

Different mortgages included in one suit, 2839

Independent suit by first mortgagee, 2838

Separate suits to foreclose one mortgage, 2837

Scope of treatment, 2809

Second foreclosure, 2872

Separate suits to foreclose one mortgage, 2837

State statutes:

Determination of rights under mortgage, 2817

Effect on equity jurisdiction of federal court, 2813

Effect on federal practice generally, 2818

Ejectment, 2814

Equity of redemption, 2873

Recovery of deficiency decree, 2889

State remedy in federal court, 2814

Statute of limitations, 2817, 2847

Statute of limitations:

Deficiency decree, 2895

State statutes, 2817, 2847

Who may set up statute, 2848

Stay pending action at law, 2836

Strict foreclosure, 2854

Title of purchaser at sale, 2873

Usury as defense to suit, 2853

FOREIGN SOVEREIGN:

Jurisdiction of suits against, 483

FORFEITURES:

Jurisdiction in equity, 36

INDEX.

[References are to pages.]

FORGERY:

Bill to review decree based on forgery, 2149

FORMER ADJUDICATION:

See **RÈS JUDICATA**

FORMS:

Abatement, plea in, Appendix, p. 1791

Accounts and accounting:

Bill for partnership accounting and for receiver, Appendix, p. 1781

Decree for injunction and accounting in patent case, Appendix, p. 1817

Affidavit:

For preliminary injunction in copyright case, Appendix, p. 1802

To demurrer, Appendix, p. 1787

Another suit pending, plea in abatement for, Appendix, p. 1791

Answer denying infringement of copyright, Appendix, p. 1796

Appearance, *præcipe* for, Appendix, p. 1786

Assistance, writ of, Appendix, p. 1823

Bill:

Carrying decree into execution, Appendix, p. 1784

Enjoining infringement of copyright, Appendix, pp. 1766, 1773

Enjoining infringement of patent, Appendix, p. 1764

Enjoining infringement of trademark, Appendix, p. 1778

Exceptions to for scandal or impertinence, Appendix, p. 1786

Partnership accounting and for receiver, Appendix, p. 1781

Bond for injunction, Appendix, p. 1804

Certificate to demurrer, Appendix, p. 1787

Confirmation of foreclosure sales, Appendix, pp. 1811, 1812, 1813

Consent decree, Appendix, p. 1816

Copyright:

Affidavit for preliminary injunction in copyright case, Appendix, p. 1802

Answer denying infringement, Appendix, p. 1796

Bill to enjoin infringement, Appendix, 1766, 1773

Decree for permanent injunction, Appendix, p. 1818

Writ of injunction, Appendix, p. 1821

Cross bill for foreclosure, Appendix, p. 1782

Decree:

Bill to carry decree into execution, Appendix, p. 1784

Confirming foreclosure sale, Appendix, pp. 1811, 1812, 1813

Consent decree, Appendix, p. 1816

Distributing balance after foreclosure sale, Appendix, p. 1814

Injunction and accounting in patent case, Appendix, p. 1817

Order and decree confirming decree of foreclosure sale, Appendix, p. 1811

Permanent injunction against interference with interstate commerce, Appendix, p. 1820

Permanent injunction in copyright case, Appendix, p. 1818

Demurrer:

Affidavit and certificate to, Appendix, p. 1787

[References are to pages.]

FORMS — *continued*

Demurrer — *continued*

Defendant's want of interest in subject matter, Appendix, p. 1789

For multifariouaness, Appendix, pp. 1787, 1788

Order overruling, Appendix, p. 1801

Order sustaining, Appendix, p. 1800

Order sustaining demurrer and dismissing bill, Appendix, p. 1800

Plaintiff's want of interest in subject matter, Appendix, p. 1788

Specifying several grounds, Appendix, pp. 1789, 1790

Disclaimer, Appendix, p. 1794

Exceptions to bill for scandal or impertinence, Appendix, p. 1786

Exceptions to master's report of foreclosure sale, Appendix, p. 1810

Execution, bill to carry decree into, Appendix, p. 1784

Foreclosure:

Cross bill, Appendix, p. 1782

Decree and order confirming decree of foreclosure sale, Appendix, p. 1811

Decree confirming foreclosure sale, Appendix, pp. 1812, 1813

Decree distributing balance after sale, Appendix, p. 1814

Exceptions to master's report of sale, Appendix, p. 1810

Master's report of foreclosure sale, Appendix, p. 1808

Notice of rule to show cause against confirmation of sale, Appendix, p. 1810

Order and decree confirming decree of foreclosure sale, Appendix, p. 1811

Rule to show cause against confirmation of sale, Appendix, p. 1809

Impertinence, see *infra*, Scandal and impertinence

Infringement:

Answer denying infringement of copyright, Appendix, p. 1796

Copyright, bill to enjoin, Appendix, pp. 1766, 1773

Patent, bill to enjoin, Appendix, pp. 1764, 1773

Trademark, bill to enjoin, Appendix, p. 1778

Injunction:

Affidavit for preliminary injunction in copyright case, Appendix, p. 1802

Bill to enjoin infringement of copyright, Appendix, pp. 1778, 17773

Bill to enjoin infringement of patent, Appendix, p. 1768

Bill to enjoin infringement of trademark, Appendix, p. 1778

Bond, Appendix, p. 1804

Decree for injunction and accounting in patent case, Appendix, p. 1817

Decree for permanent injunction against interference with interstate commerce, Appendix, p. 1820

Decree for permanent injunction in copyright case, Appendix, p. 1818

Order for preliminary injunction, Appendix, p. 1805

Order for preliminary injunction against picketing, etc., Appendix, p. 1805

Order for preliminary injunction and appointment of receiver, Appendix, p. 1806

Restraining order enjoining laborers and labor organization, Appendix, p. 1801

Writ of injunction in copyright case, Appendix, p. 1821

[References are to pages.]

FORMS — continued

Interstate commerce, decree for permanent injunction against interference with, Appendix, p. 1820

Labor combinations:

Order for preliminary injunction against picketing, etc., Appendix, p. 1805

Restraining order enjoining laborers and labor organizations, Appendix, p. 1801

Master in chancery:

Exceptions to report of foreclosure sale, Appendix, p. 1810

Report of foreclosure sale, Appendix, p. 1808

Multifariousness, demurrer for, Appendix, pp. 1787, 1788

Notice of rule to show cause against confirmation of foreclosure sale, Appendix, p. 1810

Orders (see also *infra*, Rules):

Order and decree confirming decree of foreclosure sale, Appendix, p. 1811

OVERRULING DEMURRER, Appendix, p. 1801

Preliminary injunction, Appendix, p. 1805

Preliminary injunction against picketing, etc., Appendix, p. 1805

Preliminary injunction and appointment of receiver, Appendix, p. 1806

Restraining order enjoining laborers and labor organization, Appendix, p. 1801

Sustaining demurser, Appendix, p. 1800

Sustaining demurrer and dismissing bill, Appendix, p. 1800

Partnership:

Bill for partnership accounting and for receiver, Appendix, p. 1781

Patents:

Bill to enjoin infringement, Appendix, p. 1764

Decree for injunction and accounting, Appendix, p. 1817

Pendency of suit, plea in abatement for, Appendix, p. 1791

Picketing, etc., order for preliminary injunction against, Appendix, p. 1805

Plea in abatement for pendency of another suit, Appendix, p. 1791

Plea to bill to carry decree into execution, Appendix, p. 1794

Praeclipe:

For appearance, Appendix, p. 1786

For subpoena *ad respondendum*, Appendix, p. 1785

Preliminary injunctions, see *supra*, Injunctions

Receivers:

Bill for partnership accounting and for receiver, Appendix, p. 1781

Order for preliminary injunction and appointment of receiver, Appendix, p. 1806

Replication, Appendix, p. 1799

Report:

Master's report of foreclosure sale, Appendix, p. 1808

Order and decree confirming decree of foreclosure sale, Appendix, p. 1811

Restraining order:

Enjoining laborers and labor organizations, Appendix, p. 1801

INDEX.

2001

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

FORMS — *continued*

Rules (see also *supra*, Orders):

Notice of rule to show cause against confirmation of foreclosure sale,
Appendix, p. 1810

To show cause against confirmation of foreclosure sale, Appendix, p. 1809

Scandal and impertinence, exceptions to bill for, Appendix, p. 1786

Subpoena ad *respondendum*, Appendix, p. 1785

Præcipe for, Appendix, p. 1785

Trademark, bill to enjoin infringement of, Appendix, p. 1778

Wrts:

Assistance, wrt of, Appendix, p. 1823

Injunction in copyright case, Appendix, p. 1821

FRAUD:

Allegations of, effect on alternative relief, 267, 268

Anomalous plea negativig, 843

Answer in support of plea to charge of fraud, 992, 998

Bill of review for fraud by counsel, 2149

Certainty in alleging, 186

Decree under general prayer, 1945

Defense to foreclosure suit, 2851

Details, allegation of, 188

Discovery of, allegations in regard to, 190

Fraudulent contracts, jurisdiction of equity, 37

Fraudulent sales, appealability of decree, 1938

General demurrer to bill charging fraud not favored, 965

General prayer, relief grantable under, 252, 263

Impeachment of decree for, see BILL TO IMPEACH DECREE

Multifariousness, 414, 416, 438

Prejudice from unsupported charges of, 189

Specific facts, allegation of, 187

Submission of issue to jury, 1524

Suit to prevent fraudulent use of decree, 1241

FRAUDS, STATUTE OF:

See STATUTE OF FRAUDS

FRIEND OF COURT:

Right to appear at hearing, 1907

FUNDS AND DEPOSITS IN COURT:

Appealability of decree, 1938

Control of court over funds, 1392, 1325

Discretion of court, 1324

Doing equity, 1322

Effect of payment into court on rights of parties, 1322

Interest on fund, 2254

Eq. Prac. Vol. III.—126.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

FUNDS AND DEPOSITS IN COURT—continued

- Interpleader, 2245, 2255, 2256
- Intervention, see **INTERVENTION**
- Investment of money, 1324
- Liability of government for money deposited in bank, 1323
- Motion, when proper, 1322
- Order for payment into court, 1322
- Order for payment out of court, 1324
- Protection of person paying into court, 1323
- Security for costs, 576
- Tender by voluntary payment, 1325

GAS:

- Jurisdiction of equity as to rates charged by gas companies, 74

GIBSON, CHANCELLOR:

- Test of multifariousness, 440

GOVERNOR:

- Formal or nominal party, 536

GUARDIAN:

- Citizenship, allegation of, 327
- General guardian, right to defend suit against infant, 486
- Guardian *ad litem*, see **GUARDIAN AD LITEM**
- Guardian as next friend, 454
- Plea denying guardianship, 838
- Right to be heard on motion, 1277
- Supplemental bill to bring in successor, 1177

GUARDIAN AD LITEM:

Suits against infants:

- Answer by, 491
- Collusion by, effect and decree, 495
- Control over course of proceedings, 494
- Duties of in general, 485
- Infant *feme covert*, 501
- Motion for appointment, 488
- Necessity for appointment, 485
- Order of appointment, when not necessary, 489
- Petition for appointment, 488
- Power to consent to decree, 492, 493
- Removal of, 490
- Responsibility of, 490
- Stage of proceedings at which appointed, 486
- Who appointed, 488

Suits against insane persons:

- Appointment in lieu of committee, 497
- Suits by insane persons, 458, 459, 460

INDEX.

2003

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

HEARING (see also HEARING ON BILL AND ANSWER; HEARING ON BILL, ANSWER, AND REPLICATION):

Amendments at final hearing, 1923

Amicus curiae, 1907

Argument:

Conformity to case made in bill, 1913

Oral or written argument, 1914

Right to open and close, 1912

Arrival of new term, 1916

Bill taken *pro confesso*:

Order on final hearing, 1922

Right of defendant to be heard, 1565

Time of setting down for hearing, 1563

Briefs, 1906

Bringing cause to hearing generally, 1897-1905

Control of court over interlocutory decrees and court orders, 1918

Counsel, 1907

Curing prior irregularities in general, 1924

Decision on hearing, 1917

Defects waived at final hearing, 1930, 1931

Definition, 1897

Disposal of cause where party fails to appear, 1910

Exclusion of evidence, 1921

Final, 1897

Incidents of hearing generally, 1906-1921

Interlocutory matters available at hearing, 1922-1929

Interlocutory or final, 1897

Mode of presenting case where parties appear, 1911

Motions, hearing of, see MOTION

Objections for want of parties:

English practice, 1925

Equity rule, 1926

Federal practice, 1926

Presentation of cause to court, 1908, 1911

Private hearing, 1909

Right of party to conduct cause, 1907

Setting down for hearing:

Advancing cause on calendar, 1903, 1904

Before end of probatory term, 1901

Cross suits, 1069, 1904

English chancery practice, 1898, 1899

Federal practice in general, 1900

Placing cause on trial calendar, 1902

Suits involving public interest, 1903

Suits involving similar issues, 1904

Time of setting cause, 1901

Submission of cause to court, 1914

Subpoena to hear judgment, 1899

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

HEARING — *continued*

- Supplemental bill, 1201
- Supplying defects in evidence:
 - Discretion of court, 1927, 1928
 - Laches, effect of, 1929
 - Order that cause stand over, 1927
 - Remand for further evidence, 1927
 - Review of court's decision, 1928
 - Situation justifying order to supply, 1928
- Term time or vacation, 1908
- Time of hearing, 1908
- Waiver of irregularities in interlocutory proceedings, 1930, 1931

HEARING ON BILL AND ANSWER (see also HEARING; HEARING ON BILL, ANSWER, AND REPLICATION):

- Abandonment of hearing, 817
- Amendment of answer, 819
- Answer as evidence for defendant, 816, 823
- Construction of admissions in answer, 816
- Decree for defendant, 820
- Decree for plaintiff, 819
- Defects waived by, 814
- Dismissal of bill, 820
- Evidence on hearing, 818
- Foundation and reason of practice, 810, 811, 812
- Manner of setting cause for hearing, 813
- Place of hearing, 818
- Replication, discretion of court to allow, 820
- Replication on abandonment of hearing, 817
- Right of defendant to take proof, 816, 823
- Supplemental answer, 819
- Testing legal sufficiency of defense:
 - Demurrer not available, 811
 - Exceptions not available, 810
- Time of hearing, 818
- Time of setting cause for hearing, 813

HEARING ON BILL, ANSWER, AND REPLICATION (see also HEARING; HEARING ON BILL AND ANSWER):

- Distinguished from hearing on bill and answer, 823
- Formalities in setting cause for hearing, 824
- Place of hearing, 823
- Placing cause on calendar, 823
- Resemblance to hearing on bill and answer, 822
- Right of defendant to take proof, 823
- Time of hearing, 823

INDEX.

2005

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

HIGH COURT OF CHANCERY:

Jurisprudence of, in general, 93, 94
Orders of, see ENGLISH ORDERS IN CHANCERY

HUSBAND AND WIFE:

See MARRIED WOMEN

IDIOTS:

See INSANE PERSONS

ILLEGAL CONTRACTS:

Jurisdiction of equity, 37

IMBECILES:

See INSANE PERSONS

IMPEACHMENT:

Decree, see BILL TO IMPEACH DECREE
Witnesses, see WITNESSES

IMPERTINENCE:

See SCANDAL AND IMPERTINENCE

IMPRISONMENT:

Contempt proceedings, 2488

IMPROVEMENTS:

Preferential claims in receivership cases, 2744, 2745

INFANTS:

Amendments in behalf of, 1083
Answer of infant as evidence, 1590
Appearance by, 642
Capacity to sue, 453, 454
Consent decrees on behalf of, 1958
Consent to jurisdiction over, 486
Decree:
 Basis of decree against, 492
 Consent decree, 492-494
 Force and effect of decree against, 454, 495
 Pro confesso against, 1558
Defense by, how conducted, 486
Demurrer where plaintiff appears to be infant, 931
Guardians, see GUARDIAN; GUARDIAN AD LITEM
Name in which suit by infant to be brought, 456
Next friend, see NEXT FRIEND
Position on record as part plaintiff or defendant, 455, 496, 558

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

INFANTS — *continued*

- Service of subpoena on, 601
- Suit against infant feme covert, 501

INFORMALITY:

- Motion to dismiss or strike out for, 306, 1344

INFORMATION:

- Distinguished from bill, 137
- Office of, 136
- Procedure in suits prosecuted by, 139
- Use of in federal courts, 138

INFRINGEMENT:

- Forms relating to, see FORMS
- Patents, see PATENTS
- Trademarks, see TRADEMARKS

INITIALS:

- Use of in introduction of bill, 169

INJUNCTIONS:

Affidavits:

- Answer as affidavit, 2327, 2328
- Bill as affidavit, 2305
- Contradiction of answer by, see *infra*, Affidavits to contradict answer
- Hearing of motion, affidavits on, see *infra*, Hearing of motion
- Rebuttal, 2329
- Service of affidavits on motion for preliminary injunction, 2320
- Surrebuttal, 2330
- Weight, 2332

Affidavits to contradict answer:

- Exceptions to rule, 2334
- Former practice, 2333
- On motion to dissolve, 2411, 2412
- Present practice, 2335

Allegations of bill:

- Absence of remedy at law, 2305
- Amendment, 2308
- Definiteness and certainty, 2308
- Information and belief, 2307
- Necessity of specific allegations, 2306
- Positiveness required, 2305

Answer:

- Answer as affidavit by defendant, 2327, 2328
- Contradiction of answer by affidavits, see *supra*, Affidavits to contradict answer
- Demurrer not overruled by answer used as affidavit, 2328

INDEX.

2007

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

INJUNCTIONS — *continued*

Answer — *continued*

Dissolution on denials in answer, see *infra*, Dissolution
Weight of answer on motion to dissolve, 2407, 2408

Appeals:

Appeal as injunction, 2384
Merits of controversy, 2385
Order granting injunction:
 Case presented on appeal, 2385
 Imposition of terms by appellate court, 2389
 Modification by appellate court, 2388
 Order granted by court of ancillary jurisdiction, 2387
 Presumption in favor of order, 2386
 Reviewing discretion of lower court, 2386
 Statutory right of appeal, 2383
 Suspending injunction pending appeal, 2384
Preliminary injunctions, 2346

Application for preliminary injunction:

After proof taken, 2317
Motion, petition or rule to show cause, 2316
Reasonableness of notice, 2319
Service of copy of bill and affidavit, 2320
Service of notice, 2318
Time of application, 2317

Application for restraining order, 2310

Bill:

Allegations, see *supra*, Allegations of bill
Amendment, 1105, 1136
Bill as pleading and affidavit, 2305
Defense after *pro confesso*, 2424
Dismissal where injunctive relief impossible, 2418
Forms of bills, see FORMS
Necessity of bill, 2302
Prayer, see *infra*, Prayer
Service of copy on motion for preliminary injunction, 2320
Supplemental bill, 2441, 2442
Verification, 2309

Bond:

Additional security, 2363
Date, 2362
Discretion of court, 2362
Effect of modification of injunction, 2415
Form of, see FORMS
Notice of giving bond, 2369
Prerequisite to recovery of damages, 2419
Proceedings on bond, see *infra*, Proceedings on bond
Remission of liability, 2428, 2429
Requirement of bond from defendant on withholding injunction, 2364

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2607.]

INJUNCTIONS — *continued*

Bond — *continued*

- Requirement of bond from plaintiff, 2302
- Restraining orders, 2311
- Retrospective or prospective operation, 2424
- Suits by United States, 2355

Chambers and vacation, 2300

Classification in general, 2293

Class suit for injunction to restrain strike, 548

Common injunction:

- Cases on which issuable, 2290
- Definition and nature, 2290
- Equity rule and statute, 2292
- Federal practice generally, 2292

Construction:

- General words, 2382
- Reference to bill, 2382
- Reference to intent and purpose, 2381
- Reference to particular injury, 2382

Contempt, see CONTEMPT

Contents of writ, 2366

Definitions and distinctions:

- Common and special injunctions, 2290
- Final injunctions, 2295
- Injunctions and injunctive orders, 2284
- Judicial writ, 2284
- Preliminary injunctions, 2293
- Prohibitory and mandatory injunctions, 2288, 2289
- Remedial writ, 2284
- Restraining orders, 2293

Demurrer not overruled by answer used as affidavit, 2328

Demurrer to prayer for writ, 950

Determination of whole controversy in injunction suit, 2351, 2422

Discretion of court:

- Dissolution, 2398
- Evidence at hearing of motion, 2321
- Grant of final injunction, 2438
- Modification or dissolution of injunction, 2398
- Preliminary injunctions, see *infra*, Preliminary injunctions
- Remission of liability on bond, 2429
- Requiring bond from plaintiff, 2362
- Restraining orders, 2312
- Review of discretion on appeal, 2386

Dissolution:

- Absence of necessary party, 2403
- Amendment of bill, 2393
- Answer meeting case made in bill, 2407, 2408
- Burden of proof, 2399
- Continuance by refusal to dissolve, 2414

INDEX.

2009

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

INJUNCTIONS — *continued*

Dissolution — continued

- Cure of irregularities, 2416

Denials in answer:

 - Affidavits contradicting answer, 2411, 2412
 - Application of general rule in federal courts, 2410
 - Averments not responsive, 2409

Cause not of equitable cognizance, 2405

Defendants successful in action at law, 2403

Denials in answer:

 - Denials of conclusions, 2409
 - Denials on information, 2409
 - Effect of introduction of affidavits, 2412
 - Limitations of rule, 2408
 - Meeting case made in bill, 2407
 - Requisites of answer generally, 2407, 2408
 - Weight of answer, 2407

Discretion of court, 2398

Dismissal of bill, 2392

Evidence that would have prevented issuance, 2403

Filing of supplemental bill, 2393

Grounds for dissolution generally, 2403

Imposition of terms, 2413

Issuance of final decree, 2392

Laches in prosecution of suit, 2406

Lack of benefit to plaintiff, 2403

Motion, see *infra*, Motion to dissolve or modify

Power of court, 2390

Preliminary by grant of final injunction, 2392

Reinstatement of injunction, 2417

Removal cases, 2391

Restraining orders, 2315

Waiver of defendant's delinquency, 2406

Want of equity, 2404

Want of jurisdiction, 2404

process of law, 2285

action:

Dissolution, see *supra*, Dissolution

Injunctions granted in vacation, 2300

Limiting duration of restraining order, 2314

et of amendment of bill on prior injunction, 1136

lence:

Hearing of motion, 2321-2324

mination of witnesses at hearing, 2321

arre application, 1280

territorial operation, 2380

, 2365

al injunctions:

Balance of convenience, 2437

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

INJUNCTIONS — *continued*

Final injunctions — *continued*

- Considerations affecting right generally, 2436
- Defense after *pro confesso*, 2434
- Discretion of court, 2438
- Dissolution of preliminary by grant of final injunction, 2392
- Effect of decision granting preliminary injunction, 2435
- Form of decree, 2366, 2439; and see **Forms**
- Incidents of final decree, 2433
- Modification on change of conditions, 2440
- Nature in general, 2295
- Retention of jurisdiction, 2439
- Right to final injunction generally, 2436
- Supplemental bill, 2441, 2442
- Time of granting, 2295

Foreclosure of invalid mortgage, 2835

Form and contents of writ, 2366, 2439; and see **Forms**

Hearing of motion:

Affidavits:

- Affidavits in rebuttal, 2329
 - Affidavits in surrebuttal, 2330
 - Affidavits taken after time allowed, 2331
 - Contradiction of answer by affidavits, 2333-2335
 - Requisites and scope of plaintiff's affidavits, 2325
 - Sworn answer as affidavit, 2327, 2328
 - Weight, 2332
- Control of court over mode of proof, 2321
 - Defendant's case in opposition of motion, 2326
 - Determination of whole cause on motion, 2322
 - Discretion of court as to evidence, 2321
 - Documentary evidence, 2324
 - Examination of witnesses, 2321
 - Hearing on pleadings and affidavits, 2321
 - Plaintiff's evidence generally, 2323
 - Scope of inquiry, 2338

In aid of sequestration, 672

Injunctional orders, 2284

Interference with receiver's possession, 2599, 2600

Interlocutory injunctions, see *infra*, Preliminary injunctions

Interpretation, see *supra*, Construction

Irreparable injury as prerequisite to issuance, 2341, 2342

Judgment at law, effect of injunction against, 2301

Jurisdiction:

- Dissolution for want of jurisdiction, 2404
- Mandatory injunctions, 2289
- Retention of jurisdiction after final injunction, 2439
- Right to injunction as ground of equitable jurisdiction, 2283

Mandatory injunctions:

- Auxiliary process to prohibitory inj... 2361

INDEX.

2011

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

INJUNCTIONS — *continued*

Mandatory injunction — *continued*

- Caution of court in exercising jurisdiction to grant, 2289
- Definition and nature, 2288
- Hesitancy of courts in granting, 2358
- Incidental mandatory features, 2357
- Jurisdiction, 2289
- Mandatory character under prohibitory form, 2358
- Nature of equity to justify, 2359
- Power of court to grant, 2358
- Preliminary injunctions not usually mandatory, 2356
- Regulation of traffic by, 2360
- When injunction not objectionably mandatory, 2357

Modification:

- Burden of proof, 2399
- Decree inconsistent with injunction, 2392
- Discretion of court, 2398
- Effect on liability on bond, 2415
- Final injunction, 2440
- Imposition of terms, 2413
- Motion, see *infra*, Motion to dissolve or modify
- Power of court, 2390
- Reinstatement of injunction, 2417

Motion:

- Burden of proof, 2399
- Dissolution or modification, see *infra*, Motion to dissolve or modify
- Hearing of motion, see *supra*, Hearing of motion

Motion to dissolve or modify:

- Cure of irregularities by denial of motion, 2416
- Discretion of court, 2398
- Dissolution generally, see *supra*, Dissolution
- Evidence available generally, 2402
- Grounds of motion, 2394
- Imposition of terms, 2413
- Judge before whom motion to be made, 2396
- Meeting case made in bill, 2400
- Notice of motion, 2397
- Scope of inquiry, 2401
- Time for making motion, 2395

Nature of writ, 2287

Necessity of formal writ, 2366

Notice:

- Application for preliminary injunction, 2319
- Delay of plaintiff, 2370
- Motion to dissolve or modify, 2397
- Necessity in general, 2294
- Necessity of notice before punishment for contempt, 2453
- Necessity of serving copy of order or writ, 2368
- Notice of giving bond, 2369

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

INJUNCTIONS — *continued*

Notice — *continued*

- Restraining orders, 2293, 2310
- Sufficiency, 2368

Operation *in personam*, 2287

Order granting injunction:

- Appeals, *see supra*, Appeals
- Nature and contents, 2365
- Scope of order, 2371

Persons against whom writ operates:

- Agents, 2373
- Confederates, 2373
- Defendant, 2273
- Defendants brought in by leave, 2375
- Effect of injunction against agent, 2378
- Extraterritorial operation, 2380
- Form of writ generally, 2373
- Minors, 2379
- Naming or describing persons affected, 2373
- Officers of corporations, 2376
- Privies, 2373
- Servants, 2373, 2378
- Strangers to suit, 2374
- Successor in estate, 2377

Power to issue writ:

- Circuit judge, 2299
- Constitutional and statutory provisions, 2285
- District judge, 2298
- Federal courts generally, 2285
- Mandatory injunctions, 2358
- Supreme court justice, 2297

Practice governed by federal law, 2286

Prayer:

- Equity rule, 2303
- Exceptions to rule requiring special prayer, 2304
- Necessity for special prayer, 2303, 2304

Preliminary injunctions:

- Accomplished acts, 2353
- Adoption of course conducive to minimum injury, 2348
- Application, *see supra*, Application for preliminary injunction
- Conservative and not remedial instrument, 2356
- Consideration of injury to third person, 2349
- Definition, 2294

Discretion of court:

- Acts already accomplished, 2353
- Balance of convenience, 2347
- Cessation of wrongful acts, 2354
- Circumstances of each case, 2336, 2338
- Consideration of right of appeal, 2346

INDEX.

2013

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

INJUNCTIONS — *continued*

Preliminary injunctions — *continued*

Discretion of court — *continued*

Considerations bearing on exercises of discretion, 2337

Determination of whole controversy, 2351

Doubt as to jurisdiction, 2339

Doubt as to title to relief, 2341, 2343

Doubtful questions of law, 2345

Landlord and tenant, 2352

Minimizing injury, 2348

Miscellaneous considerations, 2355

Preservation of *status quo*, 2350

Remedy at law, 2340

Rights of third persons, 2349

Scope of inquiry, 2338

Showing irreparable injury, 2342

Dissolution, see *supra*, Dissolution

Effect of doubt as to jurisdiction of court, 2339

Equity rule governing issuance, 2296

Fiat, 2365

Forms relating to, see FORMS

Function to preserve *status quo*, 2356

Irreparable injury, 2341, 2342

Mandatory injunctions, see *supra*, Mandatory injunctions

Modification, see *supra*, Modification

Motion to dissolve or modify, see *supra*, Motion to dissolve or modify

Nature of writ, 2356

Necessity of clear title to relief, 2341

Necessity of formal writ, 2367

Notice, see *supra*, Notice

Order for issuance, 2365, 2371

Persons against whom operative, see *supra*, Persons against whom writ operates

Preservation of *status quo*, 2350

Preventing entry of landlord, 2352

Remedy at law, 2340

Restraining orders, see *infra*, Restraining orders

Right of appeal, 2346

Scope, see *infra*, Scope

Statute governing issuance, 2296

Stockholder acquiring interest for purpose of suit, 2355

United States as plaintiff, 2355

Prerequisites to issuance:

Actual danger of injury, 2354

Clear title to relief, 2341

Danger of irreparable injury, 2341, 2342

Institution of suit, 2303

Positive averments in bill, 2305-2307

Special prayer, 2303, 2304

{References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.}

INJUNCTIONS — continued

Prerequisites to issuance — continued

Valid bill, 2308

Verification of bill, 2309

Proceedings on bond (see also *supra*, Bond) :

Damages recoverable:

Conjectural and speculative damages, 2425

Counsel fees, 2425

Damages incident to delay of suit, 2426

Elements in general, 2425

Expenses, 2425

Limitation of recovery to damages pleaded, 2427

Time lost, 2425

Discretion in remitting liability, 2429

Estoppel of surety, 2431

Federal question, 2423

Forum, 2420, 2421

Indemnity of surety, 2432

Law determining liability, 2422

Power of court to remit liability, 2428

Right of surety to day in court, 2430

Prohibitory injunctions, definition and nature, 2288

Provisional injunctions, see *supra*, Preliminary injunctions

Receivership proceedings, see RECEIVERS

Reinstatement after dissolution, 2417

Remedy at law:

Denial of preliminary injunction, 2340

Restraining orders:

Application, 2310

Bond to indemnify defendant, 2311

Definition, 2293

Discharge, 2315

Discretion of court, 2312

Filing bill, 2310

Form of, see FORMS

Limiting duration, 2314

Notice, 2293, 2310

Purpose, 2293

Service, 2310

Statute governing issuance, 2293

Validity as affected by jurisdiction of court, 2313

Rule of court governing issuance as provisional remedy, 2790

Scope:

Extension by filing supplemental bill, 2372

Inquiry on application for preliminary injunction, 2388

Inquiry on motion to dissolve or modify, 2401

Limitation by case made in bill, 2372

Order granting injunction, 2371

Persons affected by writ, see *supra*, Persons against whom writ operates

INDEX.

2015

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

INJUNCTIONS — *continued*

Scope — *continued*

 Protection of plaintiff's rights, 2371

 Second suit for injunction, 2443

 Sequestration, aider of, 672

Special injunction:

 Definition and nature, 2291

 Discretion of court in granting, 2291

 Equity rule and statute, 2292

 Federal practice generally, 2292

 Statute governing issuance as provisional remedy, 2296

 Staying proceedings on filing of bill of review, 2128

Supplemental bill:

 Person deriving title from defendant, 2442

 Person deriving title from plaintiff, 2441

Terms:

 Appeal from order granting injunction, 2389

 Dissolution or refusal to dissolve, 2413

 Fiat, 2365

 Imposition of terms by appellate court, 2389

 Imposition of terms on defendant, 2364

 Imposition of terms on plaintiff, 2362, 1363

 Vacation, duration of writ granted in, 2300

 Verification of bill, 2309

Writ:

 Following language in bill, 2372

 Form and contents, 2366; and see Forms

 Nature, 2287

 Necessity of formal writ, 2367

 Persons affected, see *supra*, Persons, against whom writ operates

 Power to issue, see *supra*, Power to issue

INSANE PERSONS:

 Amendments in behalf of, 1083

 Appearance by, 642

 Capacity to sue, 458-460

 Decree *pro confesso* against, 1558

Guardian *ad litem*:

 Suits against insane persons, 497

 Suits by insane persons, 458-460

 Jurisdiction in suits by, 460

 Manner of defense by, 497

 Name in which suit by insane person brought, 461

 Plea in abatement, definiteness and certainty of, 854

INSOLVENCY:

 Bankruptcy, see BANKRUPTCY

 Receivership on insolvency of defendant, 2815

INSUFFICIENCY:

 Distinguished from impertinence, 766

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

INTENT:

Contempt proceedings, 2488

INTEREST:

Allegations in bill regarding interest of parties, see BILL

Amount in controversy, 363

Appointment of receiver, effect of interest in subject-matter, 2577, 2580

Computation on reference, 1399, 1433

Decree, interest on, 2202

Deficiency decree on foreclosure, 2897

Fund in hands of receiver, 2729

Fund subject of interpleader, 2254

Title, interest, and possession of receiver, see RECEIVERS

INTERLOCUTORY PROCEEDINGS:

Affidavits (see generally AFFIDAVITS) 1300

Application:

Definition, 1274

Manner of making in general, 1275, 1276

Before whom taken in general, 1261

Chambers, see *infra*, Orders grantable at chambers

Circuit courts always open, 1260

Clerk of court:

Limitation of powers generally, 1261

Office and function, 1262

Power to act on other than rule days, 1264

Consolidation of causes, see CONSOLIDATION OF CAUSES

Continuances, see CONTINUANCE

Control of court at hearing, 1918

Decree, see DECREE

Dismissal after interlocutory decree, 1332

Duty of parties to invoke control of court, 1258

Federal and English proceedings compared, 1259

Hearing:

Control of court at hearing, 1918

Interlocutory or final hearing, 1897

Matters available, 1922-1929

Injunctions, see INJUNCTIONS

Intervention, see INTERVENTION

Judicial establishment generally, 1260-1269

Matters available at final hearing, 1922-1929

Motions, see MOTIONS

Nature and object, 1256

Order appointing receiver, see RECEIVERS

Order book, 1269

Orders generally, see ORDERS

Orders grantable at chambers:

Consent hearing, 1273

Court orders, 1270

INDEX.

2017

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

INTERLOCUTORY PROCEEDINGS — *continued*

Orders grantable at chambers — *continued*

Equity rule, 1270

Judge's orders, 1270

Nature of orders grantable at chambers, 1272

Necessity of pending suit, 1272

Powers of judge in general, 1271

Practice in general, 1270

Term time or vacation, 1270

Payment into or out of court, see FUNDS AND DEPOSITS IN COURT

Petitions, see PETITION

Power of court to control procedure, 1257

Powers of judge and clerk contrasted, 1261

Preliminary injunctions, see INJUNCTIONS

Purpose in general, 1256

Reference, see REFERENCE

Rule days:

Definition, 1263

Equity rule, 1263, 1264

Formal motions on motion day, 1268

Necessity of, 1265

Period between rule days, 1266

Power of clerk on other than rule days, 1264

Power of court on other than rule days, 1265

Rule docket, 1263

Seal days, 1263

Time of hearing:

Formal motions, 1268

Informal motions, 1267

Motions grantable of course, 1267

INTERPLEADER:

Affidavit of noncollusion, 2247

Ancillary proceeding, 1237

Basis of equity jurisdiction, 2236

Bill:

Affidavit of noncollusion, 2247

Contents generally, 2244

Nature in general, 153

Offer to bring fund into court, 2245

Prayer, 2246

Proceedings on bill, 2248

Verification, 305

Bill in nature of bill of interpleader, 2243

Conditions essential to maintenance of suit:

Adverse interests of claimants, 2239

Connection of titles or interests of claimants, 2240

Colorable right of all defendants, 2244

Eq. Prac. Vol. III.—127.

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.)

INTERPLEADER—continued

- Conditions essential to maintenance of suit—continued
Enumeration of conditions, 2238
Exclusive claims by each defendant, 2244
Plaintiff mere stakeholder, 2244
Plaintiff's freedom from independent liability, 2242
Plaintiff's freedom from interest and subject of suit, 2241
Want of interest or claim by plaintiff, 2244
- Costs:
Costs to plaintiff on granting order, 2251
Payment out of fund, 2253, 2254
Solicitor's fee, 2253
- Cross bill:
Necessity and function, 2249
Proceedings on cross bill, 2250
- Decree:
Final decree as between codefendants, 2252
Preliminary decree, 2251
- Defendants' pleadings, 2249, 2250
Equity of interpleading generally, 2235-2243
Fund already in court, 2255, 2256
Illustrations of use of proceeding, 2237
Interest on fund, 2254
Offer to bring fund into court, 2245
Order in nature of order of interpleader, 2256
Order without formal bill of interpleader, 2255
Prayer of bill, 2246
Proceedings on bill, 2248
Purpose of proceeding, 2236
Requisites to maintenance, see *supra*, Conditions essential to maintenance of suit
Right to interplead, conditions of, 2235
Solicitor's fee, 2253

INTERPRETERS:

- Stenographer acting as interpreter, 1806

INTERROGATORIES:

- Answer not to contain, 235
Answer to specific interrogatories:
Corporation defendant, 737
Demurrable interrogatories, 735
Discovery of trade secrets, 734
Duty to answer in general, 730
Enforcing full discovery, 724
Form and extent of denial, 731
Generally, 724, 730
Information and belief, 732
Marshaling evidence, 733

INDEX.

2019

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

INTERROGATORIES — *continued*

Answer to specific interrogations — *continued*

Refusal to answer, 736

Underwritten note, 738

Who must answer, 737

Depositions on commission and interrogatories, see DEPOSITIONS

In bill, see BILL

Order settling on reference to master, 1441

Reference, interrogatories on, 1403, 1441

Responsiveness of answer in support of plea, 1002

INTERSTATE COMMERCE:

Forms relating to, see FORMS

INTERVENTION:

Amendment of bill on admitting new parties, 1361

Ancillary proceedings, 1245, 1350

Answer accompanying petition to intervene, 1360

Appeals:

Objection for absence of formal order, 1374

Objection for want of notice, 1375

Order allowing intervention, 1377

Order refusing intervention, 1378

Counterclaim by receiver against intervenor, 2573

Cross bill, 1047, 1362

Demurrer to petition, 1372

Discretion of court:

Petition *pro interesse suo*, 1370

Petition to be made party, 1352, 1356

Disposition of petition, 1374

Holder of receivers' certificates, 2770

Laches as affecting right, 1373

Lien claimant on receivership property, 2605

Modes of intervention in general, 1349

Notice, 1375

Petition:

Amendment, 1137

Disposition of petition, 1374

Petition *pro interesse suo*:

Advantage of proceeding, 1364

Ancillary proceeding, 1246, 1364

Application to intervention for leave, 1371

Bill filed as original bill, 1371

Claims on receivership property, 2605

Construction of petition, 1371

Control of intervenor over proceeding, 1376

Discretion of court, 1370, 1377, 1378

English chancery practice, 1865

Federal practice generally, 1366

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.)

INTERVENTION — continued

Petition *pro interesse suo* — continued

- Foreclosure proceedings, 1368
- Interest justifying intervention, 1369
- Intervention in appellate court, 1384
- Intervention in supreme court, 1385
- Jury trial of issue, 1383
- Leave of court, 1370, 1371
- Limitation of scope of intervention by court, 1374
- Nature of proceeding in general, 1294, 1364
- Receivership cases, 1367, 2605
- Reference to master:
 - Exceptions, 1381
 - Final disposition, 1382
 - Findings, 1381
 - Hearing, 1381
 - Making up issues, 1380
 - Propriety of reference, 1379
 - Report, 1381
- Status of intervening party, 1376
- Stranger whose property is seized, 1294

Petition to be made party:

- Admission of stranger on own petition, 1351
- Answer accompanying petition, 1360
- Beneficiaries in suits affecting trusts, 1358
- Citizenship as affecting jurisdiction, 1363
- Control of suit by intervenor, 1354
- Discretion of court, 1352, 1356
- Interest justifying admission of new plaintiff, 1353
- Leave of court, 1360
- Objection by original parties, 1355
- Order as to making of issues, 1361
- Persons hostile to original parties, 1355
- Plaintiff or defendant, 1352, 1354, 1355
- Principles governing determination, 1352
- Purchasers of property involved, 1357
- Quasi parties, 1357
- Right of intervenor to file cross bill, 1362
- Status of intervening party, 1354
- Trustees, 1359

Proving claim before master:

- Mode of proving claim, 1386
- Right of creditors to dispute claims *inter se*, 1388
- Status of party after proof of claim, 1387

Reference to master, see *supra*, Petition *pro interesse suo*; Proving claim before master

Reimbursement of intervenors in railroad foreclosures, 2047

Set-off by receiver against intervenor, 2573

INDEX

2021

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

INTRODUCTION:

Of bill, see BILL

ISSUES:

Conformity of decree to issues, 247, 248, 1939-1941

ISSUES TO JURY:

Action at law instead of issue:

Conclusiveness of judgment at law, 1547

Control of equity court over parties and proceedings, 1547

Necessity of establishing legal rights, 1546

Partition suits, 1546

Power of court to order, 1546

Purpose, 1546, 1550

Stating case for opinion of law judges, 1550

Subject matter wholly of legal cognizance, 1546

Suspension of proceedings in equity pending action, 1548

Time of ordering, 1549

Appeal and review of exceptions to proceedings at law, 1545

Assessment of damages, 1525

Conveyance in fraud of creditors, 1524

Court in which issues tried:

Jury brought into court of equity, 1535, 1536

Law court, 1530, 1537

Law side of equity court, 1535

Patent suits, 1536

Direction to errors and legal proceedings:

New trial in court of law, 1543, 1544

Saving errors for consideration in Appellate Court, 1545

Discretion of court:

Considerations affecting discretion, 1526

Review of discretion, 1527

Submission discretionary, 1523

Evidence:

Answer as evidence, 1531

Control of equity court over evidence, 1531

Depositions, 1531

Documentary evidence, 1532

Incorporation in record on appeal, 1545

Feigned issues:

Definition, 1521

English chancery practice, 1521

Modern practice, 1522

Findings, see *infra*, Verdict

Formalities and incidents generally, 1528-1534

Form of issues, 1530

Framing issues, 1530

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

ISSUES TO JURY—continued

- Intervention in receivership causes, 1524
- Legal causes of action, 1524
- New trial:
 - Application, 1543
 - Considerations governing grant of new trial, 1544
 - Court granting new trial, 1543
 - Grounds, 1544
 - Time of application, 1543
- Object of submission, 1526
- Occasions justifying submission, 1524
- Occasions not justifying submission, 1525
- Order:
 - Admissions by parties, 1531
 - Answer as evidence, 1531
 - Appointing time for trial, 1533
 - Depositions, 1531
 - Discharge of order, 1524
 - Incidental orders, 1531
 - Production of documents, 1532
 - Rules of evidence, 1531
- Patent cases, 1525, 1536
- Power of courts of equity to decide questions of fact, 1520
- Pro confesso* without application to set aside, 1525
- Propriety of submission:
 - Cause previously considered by master and court, 1526
 - Doubt as to material facts, 1524
 - Evidence available only by deposition, 1526
 - Issues admitted, 1525
 - Issues peculiarly proper for court of equity, 1524
 - Legal causes of action, 1524
 - Petition showing no cause of action, 1526
 - Single conclusion alone possible, 1525
- Purpose of submission, 1523
- Questions of law and fact, 1524
- Relief of court's conscience, 1524
- Right of parties to compel, 1523
- Scope of issues, 1530
- Submission on court's own motion, 1523
- Time of submission:
 - Early stages of suit, 1529
 - Evidence before court, 1528
- Trial of issues:
 - Conformity of proceedings with common-law usage, 1537
 - Court in which issues tried, 1520, 1535
 - New trial, 1543, 1544
 - Time for trial, 1533

INDEX.

2023

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

ISSUES TO JURY — *continued*

Verdict:

- Advisory character, 1540
- Certification to court of equity, 1539
- Confirmation necessary, 1542
- Conformity to issues submitted, 1538
- Conformity to pleadings, 1538
- Correct finding on erroneous submission, 1525
- Effect of erroneous submission of issue, 1525, 1527
- Form, 1538
- Postea*, 1539
- Presumption of correctness, 1541
- Res judicata*, 1542
- Return of law judge accompanying verdict, 1539
- Technicality, 1538
- Weight, 1540, 1541

JOINDER:

- Causes of action, multifariousness in, see MULTIFARIOUSNESS
- Of parties, see PARTIES

JOINT STOCK COMPANIES:

- Diversity of citizenship, allegations as to, 345

JOINT TENANTS AND TENANTS IN COMMON:

- Plea denying tenancy in common, 838

JUDGE:

- Decree by disqualified judge, 1905

JUDGMENT:

- Injunction against judgment at law, 2301
- Setting aside judgment after entry for collusion, 381

JUDICIAL NOTICE:

- Distance of city where witness resides from place of trial, 1722
- Membership of state in Union, 332

JUDICIAL SALES:

- Appealability of decree, 1938

JUDICIARY ACT:

- Appeals under, 1937
- Commissions to take testimony under, 1698
- Conformity to state practice, 9
- Distinction between law and equity recognized, 6
- Power to award costs under, 1984

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

JURISDICTION (see also **EQUITY JURISDICTION**; **VENUE**):

- Admiralty, 3
- Alignment of parties as affecting, 559
- Amendment, 1087
- Amount in controversy, 354, 359
- Ancillary proceedings, see **ANCILLARY PROCEEDINGS**
- Auxiliary jurisdiction in proceedings before examiner of court, 1690
- Averment of, see **JURISDICTIONAL AVERMENTS**
- Bankruptcy suits, 3
- Bill of review for want of, 2131
- Bill of revivor, 1202, 1239
- Bill to reform deed, 1236
- Bill to stay action of ejectment, 1236
- Circuit court, jurisdiction where federal question involved, 321
- Collusive joinder of parties, 378
- Contempt proceedings, see **CONTEMPT**
- Costs on dismissal for lack of jurisdiction, 2019-2021
- Cross bill, see **CROSS BILL**
- Demurrer for want of jurisdiction, 930, 941
- Dependent on facts at institution of suit, 315
- Dismissal as to dispensable party in order to confer jurisdiction, 530
- Dismissal for lack of jurisdiction over defendant, 1344, 1347
- District other than that prescribed by statute, 382, 383
- Effect of general appearance, 658
- Effect of presence or absence of parties, 508
- Effect of naturalization where jurisdiction dependent on diverse citizenship, 353
- Equity jurisdiction generally, see **EQUITY JURISDICTION**
- Exclusive authority of court first acquiring jurisdiction over *res*, 2529-2530
- Fictitious or fraudulent claim for relief, effect of, 315
- Foreclosure proceedings, see **FORECLOSURE**
- Form of motion for questioning jurisdiction on special appearance, 662
- Infant, consent to jurisdiction over, 486
- Injunctions:
 - Dissolution for want of jurisdiction, 2404
 - Injunction as ground of equitable jurisdiction, 2283
 - Mandatory injunctions, 2289
 - Retention of jurisdiction after final injunction, 2439
- Interference by state court with jurisdiction of federal court, 26
- Law and equity in same court, see **SEPARATION OF LAW AND EQUITY**
- Multiplicity of suits and actions, prevention of, see **MULTIPLICITY OF SUITS AND ACTIONS**
- Objections for want of:
 - Act of March 3, 1875, 376-381
 - Demurrer or plea, 375
 - Generally, 830
- Plea in abatement, 830
- Receivership cases, see **RECEIVERS**

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

JURISDICTION — continued

- Rules of practice, effect of, 111
- Service of process, necessity for, 595
- State statutes, effect of on federal jurisdiction, 23, 315
- Subsequent proceedings in state courts, effect of, 315
- Suit against foreign sovereign, 483
- Suits between states, 482
- Suits between states and individuals, 482
- Suits by insane persons, 460
- Suits by transferee of legal title and beneficial interest, 379-380
- Suit to aid or enjoin action at law, 1235
- Supplemental bill, 1238
- Voluntary appearance, effect of, 595, 658
- Waiver of objections:
 - By appearance, 595, 658
 - Power to waive objection to jurisdiction over person, 658
 - Power to waive objection to jurisdiction over subject matter, 658

JURISDICTIONAL AVERMENTS:

- Amendment, relation back of, 1103
- Amount in controversy, see **AMOUNT IN CONTROVERSY**
- Ancillary suits, 312, 1229
- Citizenship, see **DIVERSITY OF CITIZENSHIP**
- Definiteness required, 310
- Diversity of citizenship, see **DIVERSITY OF CITIZENSHIP**
- Effect of failure to make, 313
- Federal question, see **FEDERAL QUESTION**
- Necessity of incorporating in pleadings, 311
- Objections for insufficiency:
 - Act of March 3, 1875, 376-381
 - Burden of proof, 374
 - Demurrer, 372
 - Objection by court *sua sponte*, 376, 377, 378
 - Plea in abatement, 373
- Proof, necessity for, 314
- Supplemental bill, 1163
- Value in controversy, see **AMOUNT IN CONTROVERSY**
- Waiver by answer to merits, 375

JURISDICTION CLAUSE:

See **BILL**

JURISPRUDENCE:

- Derivation from High Court of Chancery, 93, 94
- Federal equity distinct general jurisprudence, 94
- Federal equity jurisprudence unaffected by state decisions, 95, 96
- Jurisdiction and jurisprudence compared, 93
- Source of equity jurisprudence in federal courts, 93

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

JURY:

- Contempt proceedings, 2451
- Partition cases, 71
- Petition for intervention *pro interessu suo*, 1883
- Procedure as affected by right to jury trial, 12
- Submission of issues, see ISSUES TO JURY

LABOR COMBINATIONS:

- Forms relating to, see FORMS
- Suits to restrain strikes in form of class suits, 548

LACHES:

- Allegations explaining, 210
- Amendment to explain plaintiff's laches, 1087
- Application for subpoena *duces tecum*, 1848
- Applications of doctrine, 211
- Appointment of receivers, 2518
- Avoidance of, how pleaded in bill, 214
- Bill of review for new evidence, 2156, 2164
- Bill to impeach decree for fraud, 2191
- Demurrer raising question, 948
- Dissolution of injunction for laches in prosecuting suit, 2406
- Foreclosure suits, 2849
- Intervention, effect on right, 1373
- Plea or answer, 884
- Statutes of limitation as affecting, 212
- Supplying defects in evidence at hearing, 1929

LANDLORD AND TENANT:

- Injunction to prevent entry of landlord, 2852

LAW:

- Separation of law and equity, see SEPARATION OF LAW AND EQUITY

LEASE:

- By receiver, see RECEIVERS

LEGAL CONCLUSIONS:

- Admission by demurrer, 926
- Allegations of in bills, 175
- Answer pleading legal conclusion as defense, 748
- Plea, 856

LEGAL QUESTIONS (see also SEPARATION OF LAW AND EQUITY):

- Cognizance of, in equity, 19

LEGATEE:

- Jurisdiction of suit by legatee against executor, 55

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

LETTERS:

Proof as exhibits, 1621

LETTERS ROGATORY:

See DEPOSITIONS

LIENS:

Attorney's or solicitor's lien:

Enforcement on removal of cause, 2062

Right of lien for fees, 2061

Services in another suit, 2061

Cross bill, 1032

Decree, lien of, 2200, 2201

Foreclosure proceedings, see FORECLOSURE

Receivership property, see RECEIVERS

Reference to ascertain, 1399

Solicitor's lien, see *supra*, Attorney's or solicitor's lien

LIMITATIONS, STATUTE OF:

See STATUTE OF LIMITATIONS

LIS PENDENS:

Amendment as new *lis pendens*, 1102

LOST INSTRUMENTS:

Discovery, 1871

Ne exeat in suit to recover on lost bond, 2265

LUNATICS:

See INSANE PERSONS

MARRIAGE:

Abatement by marriage, 1208

MARRIED WOMEN:

Appearance by, 643

As parties, see PARTIES

Decree *pro confesso* against, 1558

Demurrer where plaintiff appears to be married woman, 931

Form of answer by husband and wife, 689

Husband formal or nominal party, 537

Infant *feme covert*, suit against, 501

Joint or separate answer by married woman defendant, 500

Naming in introduction of bill, 170

Separate property:

Equity jurisdiction of suit to protect, 50

Parties in suit by wife concerning, 465

Service of subpoena on, 596

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

MASTER AND SERVANT:

Relations between receiver and employee, see RECEIVERS

MASTER IN CHANCERY (see also REFERENCE):

Appointment:

- Amendment of order, 1393
- Eligibility, 1392
- Equity rule, 1390
- In England, 1389
- In federal courts generally, 1389, 1390
- Notice of appointment, 1391
- Reason for appointment, 1393
- Recital for reason of appointment, 1394
- Record of order of appointment, 1391
- Special masters, 1390
- Standing masters, 1390, 1391

Bond, 1396

Compensation:

- Agreement between parties, 1467, 1469
- Commissions, 1468
- Considerations affecting amount, 1468
- Discretion of court, 1467
- Liability for, 1467
- Master appointed to take testimony, 1469
- Master passing on receivers' accounts, 2774
- Rate *per diem*, 1469
- Review of court's discretion, 1470

Definition, 1389

Duties in general, 1389

Forms relating to, see FORMS

Impartiality required, 1421

Liability for unauthorized foreclosure sale, 2870

Nature of office:

- Assistant of court, 1389, 1516
- Judicial position, 1421
- Representative of court, 1425

Number of masters, 1390

Oath of office, 1396

Order of appointment, 1391, 1393, 1394

Powers:

- Derivation of powers, 1398
- Reference of whole cause, 1516, 1517
- Sale of property, 1398
- Scope of powers, 1398

Power to appoint, 1390, 1391

Reference to master, see REFERENCE

Relative of judge, effect on decree, 1392

INDEX.

2029

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

MASTER IN CHANCERY — *continued*

Removal, 1397
Special and standing masters, 1390, 1391
Union of offices of master and receiver, 1395
Weight of findings of, see REFERENCE

“MAY”:

Construed to mean “shall” or “must,” 127

MINORITY:

Statement of in prayer for process, 273

MINORS:

See INFANTS

MISCONDUCT:

Certainty in alleging, 192

MISJOINDER:

See MULTIFARIOUSNESS AND MISJOINDER

MISTAKE:

Impeachment of decree for, see BILL TO IMPEACH DECREE

MITFORD, JOHN:

Authority of treatise on equity pleading, 121

MODIFICATION:

Decrees, see DECREE

MONEY:

Payment into court, see FUNDS AND DEPOSITS IN COURT

MORTGAGE:

Cross bill in suit to relieve from mortgage, 1032
Foreclosure, see FORECLOSURE
Plea to bill to foreclose or redeem from mortgage, 838

MOTION:

Appointment of guardian *ad litem*, 488
Choice between motion and petition, 1276
Classification, 1278
Contempt proceedings, see CONTEMPT
Day, 1268
Depositions, motion to suppress, see DEPOSITIONS
Dismissal, motion for, see DISMISSAL
Distinction between motion and petition, 1275, 1293

[References are to sections. Vol. I, §§ 1-1614; II, §§ 1015-2294; III, §§ 2385-2897.]

MOTION — *continued*

Hearing:

- Continuance, 1287
- Entry of order, 1288
- Ex parte* hearing, 1280
- Leave to hear out of course or time, 1283
- Procedure in general, 1287

Injunctions, see INJUNCTIONS

Motion day, 1268

Motion of course:

- Before whom made, 1278
- Definition, 1278
- Illustrations, 1278
- Notice, 1278

Notice:

- Motion of course, 1278
- Special motion, see *infra*, Special motion

Ore tenus, 1275

Parties, 1277

Payment into or out of court, see FUNDS AND DEPOSITS IN COURT

Receivership cases, see RECEIVERS

References:

- Motion for recommittal to master, 1478
- Who may move for reference, 1408

Renewal, 1289

Right to make, 1277, 1408

Scope and character in general, 1274-1277

Special motion:

- Application *ex parte*, 1280
- Basis of, 1279
- Definition, 1279
- Discretion of court, 1279
- Distinction between special motion and motion of course, 1279
- Grounds in general, 1281

Notice:

- Address, 1283
- Affidavit of service, 1285
- Entitling, 1283
- Leave of court to serve, 1284
- Requirement in general, 1280, 1282
- Service, 1283
- Signature, 1283
- Time of notice, 1282
- Waiver of defects, 1286

Service of affidavits in support, 1284

Time of making *ex parte* motions, 1280

To dismiss for want of authority of solicitor, 571, 572, 573

Vacation, 1290

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

MULTIFARIOUSNESS AND MISJOINDER:

- Alternative claims in different persons, 432
- Amendment not causing, 439
- Anticipating claims, 432
- Causes of action:
 - Ancillary contract, 410
 - Avoidance by allegation of conspiracy to defraud, 416
 - Common point of litigation, 405
 - Conflicting claims over one matter, 407
 - Copyright cases, 423, 424
 - Creditors' bill, 414, 415, 417
 - Demurrer, 436, 441, 925, 938
 - Determination of whole controversy, 397, 407, 408
 - Distinct and separate claims, 432
 - Extent of interest of several parties, 406
 - Latitude allowable in creditors' suits, 414
 - Latitude allowable in suits based on fraud, 414
 - Parties having common interest, 406
 - Patent cases:
 - Conjoint use of different patents, 420
 - Patents pertaining to single subject, 421
 - Suits for infringement generally, 419
 - Plaintiff asserting different titles, 412
 - Plaintiff deriving title from different source, 418
 - Prayer for incidental and subordinate relief, 409
 - Suits to enjoin nuisances, 418
 - Suits to test water rights, 418
 - Trade-mark and copyright cases combined, 424
 - Trade-mark cases, 422
- Complexity not equivalent to, 399
- Copyright cases, 423, 424
- Creditors' bill, 414, 415, 417
- Cross bill, 1031, 1036
- Deceit, joinder in suit for dissolution of corporation, 436
- Definition, 399
- Demurrer for, 436, 441, 556, 557, 925, 938
- Determination dependent upon facts of particular case, 401, 408
- Discretion of court, 402, 403
- Double pleading, see PLEA
- Effect on right to secondary relief, 264
- Foreclosure suits, 2839
 - Forms relating to, see FORMS
 - Fraud, 414, 416, 436
 - General rules few in number, 400
 - Gibson's test, 440
 - Illustrations of multifarious suits, 432
 - Joint interest of defendants, 435
 - Joint interest of plaintiffs, 434

INDEX.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

MULTIFARIOUSNESS AND MISJOINDER — continued

Legal and equitable causes, 89, 436

Multiplicity of suits and actions:

Actions at law in general, 429, 430

Avoidance of multiplicity by single bill in equity, 429

Convenience as affecting question, 427

Distinct and unconnected demands, 426

Number of persons having separate connected claims, 426

Prevention of in general, 425

Principle governing right to join different causes of action, 428

Suits by receiver against debtors of corporation, 431

Ticket brokers, suits against, 428

Objections for:

Answer, 441

Demurrer, 436, 441, 556, 557, 925, 938

Forms of demurrer, see FORMS

Objections by court *ex mero motu*, 442

Objection not favored, 404

Order sustaining objection, 444

Parol exceptions, 441

Waiver of defect by answer to merits, 442

Who may object, 443

Parties:

Demurrer, 556, 557, 938

Party sued in double capacity, 411

Plaintiffs deriving title from common source, 418

Patent cases, 419-421

Prayer for relief, 409

Receivership proceedings, 431

Repleader, 445

Scope of suit limited to proper issues, 398

Second suit on excinded cause of action, 446

Severance of legal and equitable causes, 445

Special demurrer, 936

Stockholders suing in own right and right of corporation, 437, 438

Suits for specific relief, 433

Trade-mark cases, 424

When fatal to bill, 404

MULTIPLICITY OF SUITS AND ACTIONS:

Jurisdiction to prevent:

Actions at law, bill to enjoin, 430

Convenience as affecting question, 427

Distinct and unconnected demands, 426

In general, 425

Joinder of different equitable causes, 428

Separate but connected claims, 425

Ticket brokers, actions against, 429

Multifariousness in bills to prevent, see MULTIFARIOUSNESS

INDEX.

2033

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

NAMES:

In introduction of bill:

- Christian name, middle name, and surname, 168
- Initials of parties, 169
- Married women, 170
- Mistake in naming party, 172
- Parties in general, 168
- Remedy for failure to state, 306

In writ of subpoena:

- Fictitious names, 589
- Number of names in one subpoena, 590

NATURALIZATION:

- Effect of where jurisdiction dependent on diverse citizenship, 353

NE EXEAT:

Affidavit:

- Amendment, 2271
- By whom made, 2271
- Definiteness and certainty, 2271
- Entitling, 2271
- Necessity, 2271
- Showing intention to depart from country, 2272
- Showing nature of claim, 2273

Against whom writ may issue:

- Citizen of foreign state, 2263
- Generally, 2262

Application for discharge, 2280

Application for writ:

- Affidavit in support of application, 2271-2273
- Equity rule, 2270
- In court or at chambers, 2269
- Mode of making application, 2269
- Notice, 2269
- Petition, 2271
- Prayer, 2270
- Time for application, 2269

Bankruptcy proceedings, 2260

Bill to recover on lost bond, 2265

Bond:

- Cancellation on discharge of writ, 2282
- Discharge on giving bond, 2278
- Form of bond, 2279
- Performance of obligation, 2279

Certainty of claim, 2266

Claim on which writ may issue:

- Cases of concurrent jurisdiction, 2265
- Debt of equitable cognizance, 2264

Eq. Prac. Vol. III.—128.

{References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2235-2897.}

NE EXEAT — continued

Claim on which writ may issue — continued

Liquidated claim, 2268

Nature of claim generally, 2264

Necessity that debt be due, 2266

Suit on prior judgment or decree, 2267

Commencement of suit as prerequisite to issuance, 2261

Demurrer to prayer for writ, 950

Direction of writ, 2276

Discharge of defendant on giving security, 2278

Discharge of writ:

Application for discharge, 2280

Grounds for discharge on merits, 2281

Proceedings incident to discharge, 2282

Discretion of court, 2268

District judge, power to issue, 2259

Equity rule, 2270

Execution of writ, 2278

Ex parte application, 1280

Form of writ:

Generally, 2276

Restraining departure from jurisdiction of court, 2277

Function of writ, 2257

Issuance:

At chambers, 2259

Commencement of suit as prerequisite, 2261

From federal court, 2258

Jurisdiction:

Cases of concurrent jurisdiction, 2265

Limitation of time of operation of writ, 2275

Liquidated claims, 2268

Lord Bacon's Ordinances, 2257

Maturity of claim, 2266

Nature of writ, 2257, 2268

Notice of application, 2269

Order granting or refusing writ, 2274

Order limiting time of operation of writ, 2275

Petition, 2271

Power to issue:

Federal courts generally, 2258

Judge, 2259

Prayer for writ, 2270

Restraint imposed by writ, 2277

Security:

Amount of security, 2278

Form of bond, 2279

Statute governing issuance, 2258

Suit for specific performance, 2266

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

NE EXEAT — *continued*

- Suit on prior judgment or decree, 2267
- Time of issuance of writ, 2261
- Writ of right, 2257

NEGATIVE PREGNANT:

- In answer, 728
- In plea, 856

NEGLIGENCE:

- Bill of review for new evidence, 2164
- Certainty in alleging, 192

NEW MATTER:

- Setting up in pleadings, 226, 227, 228

NEWSPAPERS:

- Contempt by publishing comments on trial, 2447

NEXT FRIEND:

- Citizenship, allegation of, 327
- Decree in suit as binding on infant, 454
- Guardian as, 454
- Name in which suit brought, 456
- Of corporation:
 - Guardian *ad litem* of corporation, 468
- Of infant:
 - Authority of, 457
 - Control of court over, 457
 - Control of suit by, 457
 - Interest in suit, effect of, 454
 - Proper person to be, 454
 - Resemblance to attorney or guardian *ad litem*, 458
 - Status of, 454, 458
- Of insane person:
 - Control of court over, 459
 - Guardian *ad litem*, 458
 - Necessity for appointment to maintain suit, 461
 - Superseding by guardian *ad litem*, 459
- Of married woman:
 - Control of suit by, 467
 - Husband as, 463, 465
 - Necessity for in suit by wife, 463, 465

NON EST FACTUM:

- Plea in bar, 832

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

NOTICE:

Depositions, see DEPOSITIONS
Injunction cases, see INJUNCTION
Motions, see MOTION
Proceedings before examiner of court, see PROCEEDINGS BEFORE EXAMINER
Receivership proceedings, see RECEIVER

NUISANCE:

Multifariousness in bill to enjoin, 418

NUNC PRO TUNC:

Entry of decrees, see DECREE
Taxation of costs, 2057

OATH:

Affidavits, see AFFIDAVITS
Answer, see ANSWER
Bill, see BILL
Petition, 1293, 1297

OFFER OF EQUITY:

Necessity of in bill, 216
Sufficiency of, 217

OPINIONS:

Distinction between opinion and decree, 1920

ORDER:

Appointment of master in chancery, 1391, 1393, 1394
Consolidation of causes, 1316
Contempt proceedings, see CONTEMPT
Decretal order, definition of, 1934
Dismissal, order of, see DISMISSAL
Distinction between order and decree, 1932
English orders in chancery, see ENGLISH ORDERS IN CHANCERY
Entry of interlocutory order, 1288
Forms relating to, see FORMS
For substituted service of process, 616, 628, 637, 638
Interlocutory:
 Definition, 1933
 Entry, 1288
 Granting at chambers, see INTERLOCUTORY PROCEEDINGS
Ne exeat, 2274, 2275
Nisi, see *infra*, Order to show cause
Orders in chancery, see ENGLISH ORDERS IN CHANCERY
Order to show cause:
 Comparison with motion, 1292
 Confirmation, 1291
 Forms relating to, see FORMS

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2807.]

ORDER — *continued*

Order to show cause — *continued*

Notice of application, 1291

Procedure in general, 1291

Payment into or out of court, see FUNDS AND DEPOSITS IN COURT

Reference, order for, see REFERENCE

Rehearing, orders on, see REHEARING

Revivor, orders on, 1213, 1214

Speeding cause:

Alternative form, 1308

Dismissal after lapse of three terms, 1309

Stay of proceedings, 1310

Taking bill *pro confesso*, see TAKING BILL PRO CONFESSO

Vacation:

Court to which application should be made, 1290

ORDERS IN CHANCERY:

See ENGLISH ORDERS IN CHANCERY

ORDINANCES OF LORD CHANCELLOR BACON:

Accounts, reference of, Ord. 50, p. 1703

Admission of sufficiency of answer by replication, Ord. 62, p. 1705

Affidavits:

Affidavit against affidavit, Ord. 76, p. 1708

Concerning title or merits of cause, Ord. 75, p. 1708

Contempt proceedings, Ord. 77, p. 1708

Answer, general requisites of, Ord. 63, p. 1706

Bill of review, Ord. 1-5, pp. 1695, 1696

Binding effect of decrees, Ord. 11, 12, p. 1697

Commission of delegates and weighty cases, Ord. 97, p. 1712

Commission of sewers, Ord. 94, 95, p. 1711

Commissions for charitable uses, Ord. 92, p. 1711

Commissions for examination of witnesses, Ord. 68, p. 1706

Consent of parties to references, Ord. 47, p. 1703

Contempt, Ord. 8-10, p. 1696; Ord. 77-79, p. 1708

Copies, general requisites of, Ord. 67, p. 1706

Costs in absence of probable cause, Ord. 54, p. 1704

Costs on insufficient answer, Ord. 61, p. 1705

Decrees against Act of Parliament, Ord. 6, p. 1696

Decrees at rolls, presentation to chancellor, Ord. 42, p. 1702

Decrees of other courts interrupted, Ord. 31, p. 1700

Decrees on suits after judgment, Ord. 34, p. 1701

Delivering drafts of orders—keeping copies, Ord. 38, p. 1701

Demurrer or plea—oath, Ord. 58, p. 1705

Demurrer to bill regularly subject to dismissal, Ord. 60, p. 1705

Dismissal:

Certain causes of action, Ord. 15, p. 1697

Not on full hearing—new bill, Ord. 14, p. 1697

[References are to pages.]

ORDINANCES OF LORD CHANCELLOR BACON — *continued*

Dismissal — *continued*

 Of course or on motion, Ord. 17, p. 1698

 On full hearing, Ord. 13, p. 1697

 Time for, Ord. 16, p. 1698

Election between law and chancery, Ord. 18, p. 1698

Examination *in perpetuam rei memoriam*, Ord. 73, p. 1707

Examination of credit of witness, Ord. 72, p. 1707

Examination of defendant, Ord. 70, p. 1707

Examination of witnesses after publication, Ord. 74, p. 1708

Examination of witnesses—new commissions, Ord. 69, p. 1707

Execution on decree for possession of land, Ord. 9, p. 1696

Exemplifications, Ord. 100, p. 1712

Explanation and setting down of orders, Ord. 37, p. 1701

Hearing after decree in other courts, Ord. 32, p. 1700

Hearing of demurrs and pleas tending to discharge suit, Ord. 57, p. 1705

Hearing on bill and answer, Ord. 64, 65, p. 1706

Imprisonment for breach of decree, Ord. 7-10, p. 1696

Informing court of last material order, Ord. 36, p. 1701

Injunctions:

 Arrest for debt, Ord. 25, p. 1699

 Diligence of prosecution, Ord. 24, p. 1699

 Failure to appear and answer—insufficiency of answer, Ord. 22, p. 1699

 For possession, Ord. 26, 27, p. 1700

 Possession or stay of suits, presentation to chancellor, Ord. 43, p. 1702

 Private petition, Ord. 20, p. 1698

 Selling of timber, etc., Ord. 28, p. 1700

 Stay of suits in chancery, Ord. 23, p. 1699

 To stay suits at law, Ord. 21-25, pp. 1698, 1699

Jurisdiction of court—hearing questions concerning, Ord. 45, p. 1703

Jurisdiction of parties, Ord. 11, p. 1697

Licenses to collect for losses, Ord. 99, p. 1712

Opinion by master, Ord. 49, p. 1703

Orders of confirmation or ratification—day in court, Ord. 46, p. 1703

Orders of reference, drawing of, Ord. 39, p. 1702

Orders varying from general rules—setting down reasons, Ord. 44, p. 1703

Petition, matters not cognizable, Ord. 80-83, p. 1709

Petition of bankrupts, Ord. 96, p. 1712

Pleadings of immoderate length, Ord. 55, p. 1704

Reading decrees and depositions in other courts, Ord. 71, p. 1707

References:

 Accounts, Ord. 50-53, pp. 1703, 1704

 Consent, Ord. 47, p. 1703

 Examination of court rolls, Ord. 51, p. 1704

 Insufficiency of answer, Ord. 52, p. 1704

 Questions of jurisdiction, Ord. 45, p. 1703

 Report on reference, Ord. 46, 48, 49, p. 1703

Registers, duty as to interlineations or alterations, Ord. 40, p. 1702

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

ORDINANCES OF LORD CHANCELLOR BACON—*continued*

- Registers, duty in drawing decrees, etc., Ord. 42, p. 1702
- Registers to be sworn, Ord. 35, p. 1701
- Removal of causes by special certiorari, Ord. 19, p. 1698
- Replication, new matter in, Ord. 68, p. 1706
- Report exceeding warrant of reference, Ord. 48, p. 1703
- Return, enrollment, and filing of process, Ord. 90-92, pp. 1710, 1711
- Return of depositions into court, Ord. 68, p. 1706
- Revocations and additions to rules, Ord. 101, p. 1713
- Scire facias*—enrollment of recognition, Ord. 84, p. 1709
- Sealing of pleas, Ord. 59, p. 1705
- Sequestration—what may be sequestered, Ord. 29, 30, p. 1700
- Slanderous or libelous matter in pleadings, Ord. 56, p. 1704
- Suits after judgment, Ord. 33, 34, p. 1701
- Suits *in forma pauperis*, Ord. 98, p. 1712
- Writs requiring warrant of lord chancellor, Ord. 85-89, pp. 1709, 1710

ORGANIC ACTS:

- As affecting practice in federal courts, 105, 106

ORIGINAL BILL:

- Classification of original bills, 150, 151, 157
- Definition, 141
- Dependent bill in nature of, 148
- In nature of dependent bill, 147
- Normal type of bill, 149

OUTLAWS:

- Capacity to sue, 448

PARDON:

- Contempt proceedings, 2504

PARENT AND CHILD:

- Liability of parent for violation of injunction by child, 2379

PARTIES:

- Absent party, how affected by decree, 520, 534
- Admission of necessary party by consent, 518
- Admission of new party at hearing, 517
- Alignment of parties:
 - Amendment, 1086, 1088
 - Arrangement according to adverse interests, 554
 - Community of interest, 555
 - Defendants, who should be, 557
 - Formal or nominal parties, 561
 - Generally, 553
 - Infants, 455, 496, 558
 - Interest requiring joinder as plaintiff, 555

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PARTIES — continued

Alignment of parties — continued

Jurisdiction dependent on alignment of parties to interest, 559

Misjoinder of plaintiffs, demurrer for, 556

Plaintiffs, who should be, 554

Re-arrangement of parties to defeat jurisdiction, 560

Removal cases, 559

Stockholders' suits, 562

Transposition of infant plaintiff to be defendant, 455, 496

Alternative prayer for relief, effect of diversity of parties, 269, 270

Amendments, see AMENDMENTS

Ancillary proceedings, 1248

Arrangement of parties, see *oppos.* Alignment of parties

Assignor, 527, 528

Bill of review, see BILL OF REVIEW

Bill of revivor, see BILL OF REVIVOR

Bondholders, 512

Capacity to be sued:

Alien enemy, 498

Bankrupt, 484

Foreign potentate, 483

General rule, 479

Sovereign, 479-481

State of Union, 482

United States, 480, 491

Capacity to sue:

Alien enemies:

English rule, 448

Resident alien, 451

Restoration of right, 449

Suspension of right during war, 449

Suspension of suit brought before war, 450

Artificial persons, 447

Attainted persons, 448

Corporations, 447, 468

Demurrer, 931

Excommunicated persons, 448

Foreign executors and administrators, 452

Foreign receivers, 452

Generally, 447

Infants:

Generally, 453

Suit by guardian, 454

Suit by next friend, 454

Unborn infant, 454

Insane persons:

Control of court over litigation, 459

Persons adjudged to be insane, 460

Persons not adjudged to be insane, 458

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PARTIES — *continued*

Capacity to sue — *continued*

Married women:

- General rule, 462
- Husband under legal disability, 463
- Reason for disability, 467
- Suit by wife against husband, 463
- Suit in respect to separate property, 465

Outlaws, 448

Plea in abatement, 830

States, 447

Stockholders, 469-477

United States, 447

Cestui que trust, when necessary party, 512

Classification of, in federal equity courts, 507

Class suits:

Equity rule as to making parties, 540

Generally, 539-552

Interest necessary for representative, 544

Nature and use of, 540

Representation of class interest in general, 539

Unincorporated associations, 545, 546

Competency as witnesses, 1653

Contempt proceedings, see CONTEMPT

Creditors' bills, 541

Cross bill, see CROSS BILL

Demurrer for defect of parties, 515, 933, 946

Demurrer for improper joinder of parties, 925

Demurrer for want of capacity to sue, 931

Difficulty of questions relating to, 502

Discretion of court as to making, 505, 506

Dismissal as to dispensable party in order to confer jurisdiction, 530

Dismissal for defect of parties, 1344, 1347

Dismissal for improper joinder, 529

Dispensable parties:

Assignor, 527

Definition, 519

Discretion of court, 533

Dismissal in order to confer jurisdiction, 530

Generally, 524-534

Holder of legal title, when dispensable, 525

Illustrations, 524

Omission where names unknown, 521

Parties dispensable as to particular relief, 523

Statute and equity rule, 532-534

Suit on undertaking for benefit of third person, 526

Test of dispensability, 519, 520

Formal or nominal parties:

Attorney, 535

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2807.]

PARTIES — *continued*

Formal or nominal parties — *continued*

Executor of deceased trustee, 538

Governor, 536

Husband, 637

Officer of corporation, 535

State, 536

Suits on official bonds, 536

Trustee, 538

Who are, in general, 535

General rule as to joinder, 503

Governor, 536

Holder of legal title, 525

Impeaching witnesses, 1684, 1946

Improper parties, 524-531

Indispensable parties:

Definition, 519

Dismissal for want of, 521, 522

Illustrations of, 521

Test of dispensability, 519, 520

Infants:

Capacity to sue, see *espro*, Capacity to sue

Name in which suit by infant to be brought, 456

Position on record as plaintiffs or defendants, 455, 456, 458

Joinder:

Amendment of plea of nonjoinder, 1139

Demurrer for failure to join, 515, 933, 946

Demurrer for misjoinder, 556, 557, 925, 933

Dismissal for misjoinder or nonjoinder, 1244, 1347

General rule, 503

Husband and wife, 468-467

Married women, see *wife*, Married women

Necessity of joining husband in suit against married woman, 499

Jurisdiction as affected by presence or absence of parties, 503

Liberality of equity practice, 504

Married women:

Capacity to sue, see *supra*, Capacity to sue

Effect of local statute, 455

Joinder in suit by husband, 464

Joinder of husband as co-defendant, necessity for, 499

Suit by husband against wife, 500

Suit in respect to wife's separate property, 465

Motions, parties to, 1277

Multifariousness in joinder of, see MULTIFARIOUSNESS AND MISJOINDER

Name in which suit by infant to be brought, 456

Necessary parties:

Definition of, 510

Demurrer for want of, 515, 933, 946

Distinguished from proper parties, 509

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PARTIES — *continued*

Necessary parties — *continued*

Illustrations of, 511

Plea in bar or abatement, 835

New parties:

Additional process for, 611

Injunction against new defendants, 2375

Supplemental bill, see SUPPLEMENTAL BILL

Objections for nonjoinder:

Demurrer, 515

Objection at hearing, 1925, 1926

Plea or answer, 516

Omission of dispensable parties whose names are unknown, 531
Petitions, parties to, 1294-1296

Petition to be made party in intervention, see INTERVENTION

Position of parties on record, see *supra*, Alignment of parties

Proper parties:

Demurrer for defect of parties, 514, 933, 946

Demurrer for improper joinder, 925

Distinguished from necessary parties, 509

Who are in general, 509

Real party in interest, 514

Receivership cases, see RECEIVERS

Reference, parties to, see REFERENCE

Representative parties:

Class suits, see *supra*, Class suits

Subpoena to, 593

Unincorporated associations, 545

Right to conduct hearing in person, 1907

Subpoena duces tecum to, 1833

Suggestion of want of parties by answer:

Equity rule, 754, 755

Propriety of suggestion, 754

Setting down for hearing on bill and answer, 754, 755

Supplemental bill to bring in new parties, see SUPPLEMENTAL BILL

Transposition of parties, see *supra*, Alignment of parties

Trustees:

Formal or nominal parties, 538

When necessary parties, 513, 514

Unincorporated associations:

Suit by representative parties, 545

Suits against, 546

Unnecessary parties, see *supra*, Dispensable parties

Voluntary associations, see *supra*, Unincorporated associations

PARTITION:

Action at law instead of issue to jury, 1846

Concurrent jurisdiction of equity and law, 70

Jury trial, 71

Stay for establishment of title at law, 1310

{References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PARTNERSHIP:

- Answer of partner as evidence against co-partner, 1599
- Forms relating to, see FORMS
- Limited, allegations as to diversity of citizenship, 345
- Plea denying, 838
- Plea to bill to settle partnership, 838

PATENTS:

- Certainty required in bills to restrain infringement, 200
- Court in which issues tried, 1536
- Decisions of different courts on same patent, 1919
- Infringement:
 - Answer, requisites of, 748
 - Consolidation of suits, 1314
 - Costs, right to recover, 2000, 2001
 - Cross bill, 1027
 - Definiteness and certainty of plea, 854
 - Demurrer for nonexistence of subject matter, 941
 - Demurrer raising question of novelty, 964
 - Forms relating to, see FORMS
 - Injunction against suits in several jurisdictions, 1310
 - Plea, 836, 851
 - Revivor on abatement of suit, 1204
 - Issues to jury, 1525, 1536
 - Jurisdiction of suits to protect, 77
 - Multifariousness in suits relating to, 419-421

PAYMENT:

- Answer pleading payment as defense, 747
- Payment into or out of court, see FUNDS AND DEPOSITS IN COURT
- Plea in bar, 832

PENALTIES:

- Jurisdiction in equity, 36

PENDENCY OF ANOTHER SUIT:

- See ANOTHER SUIT PENDING

PERPETUATION OF TESTIMONY:

- Admissibility of depositions in evidence, 1765, 1775
- Admissibility of evidence admissible under state law, 1776
- Answer to bill, 1772
- Basis of right, 1766
- Bill:
 - Allegations, 1770
 - Causes of action supporting, 1769
 - Demurrer, 1772
 - Denial when simpler method available, 1767
 - Denial where suit can be brought, 1768

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PERPETUATION OF TESTIMONY — *continued*

Bill — *continued*

- Disposition of bill, 1773
- Effect of nature of demand on right to maintain, 1769
- Necessity of formal bill, 1766, 1767
- Object, 1765, 1768
- Original bill, 155
- Prayer, 1771
- Bills *de bene esse*, see BILLS DE BENE ESSE
- Depositions *de bene esse*, see DEPOSITIONS
- Examination of witnesses, 1774
- Extraordinary remedy, 1767
- Methods of perpetuation, 1765
- Notice to defendant, 1767
- Order to take and perpetuate, 1773
- Plea, 1772
- Publication of testimony, 1775
- Service of process, 1767

PETITION:

- Address, 1297
- Answer, 1299
- Appointment of guardian *ad litem*, see GUARDIAN AD LITEM
- Bill of review, petition for leave to file, 2160, 2161
- Choice between motion and petition, 1276
- Comparison with supplemental bill, 1297
- Contempt proceedings, see CONTEMPT
- Demurrer, 1299
- Dismissal on motion, 1299
- Distinction between motion and petition, 1275, 1293
- Form and contents in general, 1297
- Hearing and disposition, 1299
- Intervention, see INTERVENTION
- Necessity for pending cause, 1293
- Ne exeat*, petition for, 2271
- Oath, 1293, 1297
- Parties, 1294-1296
- Plea, 1299
- Prayer, 1293, 1297
- Pro interessu suo*, see INTERVENTION
- Propriety of proceeding by petition:
 - Parties to principal suit, 1295
 - Quasi parties, 1296
 - Strangers, 1294
- Receivership cases, see RECEIVERS
- Reference to master, 1299
- Rehearing, petition for, see REHEARING
- Requisites in general, 1293

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PETITION — *continued*

- Scandal and impertinence in, 1297
- Service, 1298
- Signature, 1297
- Specification of principal cause, 1297
- Statement of material facts, 1293, 1297
- Statement of person by whom presented, 1293
- Who may file, 1293

PLACE OF BRINGING SUIT:

See **VENUE**

PLEA:

Abatement, plea in:

- Another suit pending, 830
- Application of rules of practice at law, 831
- Defective parties, 833
- Disregarding plea as nullity, 831
- Form of, see **FORMS**
- Giving better writ, 855
- Matters pleadable in abatement, 830
- Objections for insufficiency, 373
- Stockholders' suits, 830
- Waiver by answer to merits, 830
- Waiver by failure to plead, 830

Admission of allegations of bill by failure to deny, 880

Affirmative plea:

- Admission of allegations of bill, 986
- Definition and nature, 837
- Discovery not needed on affirmative plea, 986
- Distinguishing affirmative and negative pleas, 840
- Original form of plea, 839

Alternatives of plaintiff, 872

Ambiguity, 856

Amendment of, 1139

Analogy to answer, 825

Anomalous plea:

- Affirmative and negative elements, 842
- Definition and nature, 841
- Effect on right of discovery, 986
- General principles governing use, 845
- Illustrations of use, 843
- Where bill does not expressly anticipate defense, 844

Another suit pending, 830

Answer and plea setting up different defenses, 980

Answer in support of plea, see **ANSWER**

Answer, plea, and demurrer to same bill, 975, 978

Anticipated defense, plea negativating, 841-845

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PLEA — continued

- Argumentativeness, 858
- Argument of sufficiency of plea in general, 872-882
- Bar, plea in:
 - Account stated, 832
 - Bona fide* purchase, 832
 - Completeness of bar to be shown, 858
 - Defective parties, 835
 - Matters pleadable in bar, 832, 833
 - Non est factum*, 832
 - Prematurity of suit, 832
 - Res judicata*, 833
- Basing plea partly on facts alleged in bill, 829
- Bill of revivor, plea to, 1219
- Bill to foreclose or redeem from mortgage, 838
- Bill to perpetuate testimony, 1772
- Bona fide* purchase:
 - Innocent purchase as plea in bar, 832
 - Nature and requisites, 857, 858
 - Plea controverting innocent purchase, 843
- Certificate of counsel, 868
- Classification of pleas, 837
- Decree or order disposing of plea:
 - Allowing plea to stand for answer, 888
 - Answer on overruling plea, 885
 - Costs, 886
 - Discretion of court, 888
 - Effect as *res judicata*, 884, 887
 - Embodiment of plea in answer, 888
 - Form, 883
 - Leave to rely on plea in answer, 888, 889
 - Reserving benefit of plea to final hearing, 913
 - Right of plaintiff to amend or reply, 883
 - Saving benefit of plea at hearing, 888
- Defenses available by plea, 830-836
- Defining scope of plea, 861
- Definiteness and certainty generally, 854
- Demurrer:
 - Choice between plea and demurrer, 828
 - Overruling demurrer by plea, 974
 - Plea, answer, and demurrer to same bill, 975, 978
 - Propriety and effect of demurrer to plea, 873, 917
- Desirability of plea in federal courts, 912
- Discovery not made by plea, 826, 827
- Discretion of court in disposing of pleas, 888
- Distinction between plea and answer, 826
- Double pleading:
 - Duplicity in individual pleas, 851

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PLEA — continued

- Double pleading — *continued*
 - Duplicity in plea of *res judicata*, 853
 - Election between pleas, 846
 - Embodying several pleas in answer, 846
 - Leave of court to plead several pleas:
 - Discretion in granting leave, 846
 - Necessity of leave, 846
 - Order granting leave, 850
 - Waiver of obtaining leave, 846
 - When leave granted, 849
 - Multifariousness in individual pleas, 851
 - Several facts tending to one issue, 852
 - Several pleas to distinct parts of bill, 847
 - Singleness of issue raised by plea, 825, 827, 846
- Election between plea and answer, 887
- Extrinsic matter set up by plea, 828, 829
- Filing, 870
- Foreclosure of mortgage, 838
- Formal requirements in general, 861-871
- Forms relating to, see **Forms**
- Good in part and bad in part, 882
- Heirship, denial of, 838
- Impure plea, what is, 837
- Incorporation in answer, see **ANSWER**
- Incorporation of separate paper by reference, 871
- Jurisdiction, plea to, not overruled by answer to merits, 981
- Laches, 834
- Legal conclusion, 856
- Manner of testing efficacy in general, 872
- Matters not proper for plea, 836
- Motion to quash for legal insufficiency, 874
- Motion to strike, 875
- Nature and office generally, 825-829
- Negative plea:
 - Answer in support of plea required, 839
 - Definition and nature, 838
 - Distinguishing affirmative and negative pleas, 840
 - Effect on right of discovery, 987
 - Origin and history, 839
- Negative pregnant, 856
- Objection by plea for nonjoinder of parties, 516
- Of remedy at law, 85
- Partnership, denial of, 838
- Petition, plea to, 1299
- Prayer, form of, 862
- Privilege of person, 869
- Pure plea, see **AFFIRMATIVE PLEA**

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PLEA — continued

- Reducing cause to single issue, 825-827, 846
- Reference to ascertain truth of plea of another suit pending, 915, 916
- Representative capacity, denial of, 838
- Requisites in general, 846-860
- Reservation in body of plea, 861
- Res judicata*, 833, 915
- Rule that answer overrules plea, 974, 981
- Scope of plea, 881
- Setting down for argument:
 - Admission of truth of plea, 879
 - Another suit pending, 914
 - Demurral as equivalent to setting down, 873
 - Dismissal for failure to set down, 1344
 - Entry in order book, 876
 - Motion to quash as equivalent to setting down, 874
 - Notice, 876
 - Opening and closing argument, 877
 - Order of court disposing of plea, 838-890
 - Plea supported by answer, 1005
 - Propriety where sufficiency of plea questionable, 913
 - Time of hearing argument, 877
 - Waiver of objection to filing of incompatible pleading, 983
 - Waiver of right to argue, 878
 - Who may set down, 876
- Signature of counsel, 868
- Statute of limitations, see **STATUTE OF LIMITATIONS**
- Striking out:
 - Motion to strike, 875
 - Plea supported by answer, 1005
- Style of cause, 861
- Superiority of plea to demurrer, 974
- Supplemental bill:
 - Duty to plead, demur, or answer, 1197
 - Propriety of plea, 1197
 - Time to plead, 1195
- Tenancy in common, denial of, 838
- Testing plea supported by answer, 1005
- Time to plead:
 - Determination with reference to rule days, 678, 1266
 - Extension by filing demurrer, 871
 - Limitation of, 871
 - Motion to extend time, 681
 - Supplemental bill, 1195
 - Waiver of failure to plead in time limited, 680
- To distinct part of bill, 881
- Trial on plea and replication, see **TRIAL**
- Validity of plea unaccompanied by unsworn answer, 1004
- Eq. Prac. Vol. III.—129,

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PLEA — continued

Verification:

- Corporation defendant, 865
 - Effect of failure to verify, 867
 - Form of affidavit, 866
 - Necessity in general, 863
 - Rule of court, 863
 - Several defendants, 864
 - Waiver of verification, 867
- Waiver of defect of venue by plea to merits, 388
Waiver of insufficiency by going to trial, 900, 902
Waiver of right to plead by answering, 871

PLEADING:

Answer, see ANSWER

Bill, see BILL

Concurrent use of demurrer, plea, and answer generally, 973-983

Conformity of decree to pleadings, see DECREE

Demurrer, see DEMURRER

Election between several pleadings, 983

Facts, manner of pleading, 739

Incompatibility of demurrer or plea to part with answer to whole, 979

Incompatibility of several pleadings directed to whole bill, 978

Number of pleadings under modern practice, 227, 228

Number of pleadings under old practice, 226

Order of filing defensive pleadings, 973

Overruling stronger pleading by weaker, 974

Plea, see PLEA

Reference, pleadings on, see REFERENCE

Rejoinder, see REJOINDER

Replication, see REPLICATION

Scope of pleading:

- Pleading must not be too broad, 977

- Pleading must not be too narrow, 976

Sequence of defensive pleadings, 973

State statutes, relevancy of, in determining sufficiency of pleadings, 102

Testing compatibility of different pleadings, 983

POLICY:

As affecting jurisdiction, 25

POLITICAL RIGHTS:

Equity jurisdiction to enforce, 33, 34

POOR PERSONS:

Exemption of poor persons from costs, 578, 579

POSSESSION:

Receivers, see RECEIVERS

INDEX.

2051

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.)

POSSESSION, WRIT OF:

Distinguished from writ of assistance, 2218

POWER COMPANIES:

Rates, jurisdiction of equity in suits concerning, 74

PRACTICE:

Acts of Congress regulating, 107

Conformity of federal to state practice, 9

Derivation of federal equity practice, 97

Distinction between legal and equitable remedies, 103

English chancery practice, see ENGLISH CHANCERY PRACTICE

Necessity for bill and answer, 104, 677

Organic acts of territories as affecting federal equity practice, 105, 106

Rules of practice, see RULES OF PRACTICE

State laws and statutes, see STATE LAWS AND STATUTES

Supreme Court, right to regulate, 108

PRAECEIPE:

For issuance of writ of subpoena, 587

Forms of, see FORMS

PRAYER:

Alternative relief, 1946

Amendment, see AMENDMENT

Bill of interpleader, 2246

Bills generally, see BILL

Conformity of decree to prayer, 1941

Exceptions for insufficiency of answer, 777

Foreclosure proceedings, 2896

For equitable relief where remedy at law exists, 44

For process, see PRAYER FOR PROCESS

For relief, see PRAYER FOR RELIEF

Injunction, prayer for, 2303, 2304

Multifarioueness in, 409

No *exeat*, 2270

Of answer, 695

Of demurrer, 953

Petition, 1293, 1297

Receivership cases, 2547

Relief grantable under general prayer, 1943-1946

Supplemental bill, see SUPPLEMENTAL BILL

PRAYER FOR PROCESS:

Minority of defendant, statement of, 273

Names, remedy for failure to state, 306

Naming defendants, 272

Necessity and importance of, 271

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2294; III, §§ 2295-2307.)

PRAYER FOR PROCESS — *continued*

- Ne exeat*, 2270
- Oath, requirement of, 274
- Oath, waiver of, 275
- Remedy for insufficiency, 808
- Statement as to disability of defendants, 487

PRAYER FOR RELIEF:

- Accounting under general prayer, 249
- Alternative prayer:**
 - Conformity of prayer with special relief sought, 258
 - Criterion of right to prayer, 259
 - Discretion of court, 265-267
 - Foundation on successive equities, 262
 - Multifariousness, 264
 - Right as affected by parties, 269, 270
 - Scope of prayer, 255
 - Secondary relief, 263
 - Underlying principles in general, 254
- Conformity of relief to case made in bill, 247, 248, 1941
- Consistency of facts and prayers, 261
- Cumulative grounds of action, 260
- General prayer:**
 - Bill charging fraud, 252, 253
 - Relief grantable under, in general, 246
 - Suits for specific performance, 251
 - Use to effectuate relief sought in special prayer, 250
 - When sufficient in general, 243
- Inconsistency, effect of, 258
- Kinds of, 242
- Special demurrer to prayer for extraordinary relief, 950
- Special prayer:**
 - Scope and effect, 245
 - When sufficient, 244

PREFERENTIAL CLAIMS:

- Claims on receivership funds, see RECEIVERS

PREMATURE SUITS:

- Prematurity as plea in bar, 832

PRESIDENT OF UNITED STATES:

- Authority to pardon and remit punishment for contempt, 2604

PRESUMPTIONS:

- Appeal from order granting injunction, 2386
- Citizenship of stockholders, 339
- Diligence as to gathering evidence on application for bill of review, 2167
- Leave to file bill of review, 2158
- Payment of mortgage from lapse of time, 2850

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

PRIORITIES:

Preferential claims on receivership funds, see RECEIVERS

PRIVILEGE:

Competency of privileged persons as witnesses, 1649
Plea of privilege of person, 869

PRIVILEGED COMMUNICATIONS:

Compelling answers as to privileged matters before examiner, 1681, 1682
Demurrer to discovery of, 1876
Discovery of, 1876, 1886
State law binding on federal court, 1649
Subpoena duces tecum, see SUBPOENA DUCES TECUM

PRIVITY:

Bill of revivor, 1209, 1210

PROCEDURE:

Control of court of equity over procedure, 1257, 1258
Duty of parties to invoke control of court, 1258
Effect of right to jury trial, 12
Forms and modes at law and in equity, 8

PROCEEDINGS BEFORE EXAMINER (see also EXAMINER OF COURT):

Abandonment of examination, 1696
Adjournment, 1684
All or part of evidence, 1670
Auxiliary jurisdiction of court in another district, 1690
Compelling attendance of witnesses:
 English practice, 1636, 1642
 Equity rules, 1673, 1691
 Examination in another district, 1691, 1692
 Examination within district, 1673
 Statutes, 1691
 Witnesses within district, 1673
Compelling witness to answer:
 Application to judge, 1677
 Contempt proceedings, 1677
 Duty of witness to answer, 1674
 Evidence clearly improper, 1680
 Examination in another district, 1693
 Limitation of rule requiring answers to all questions, 1680-1682
 Privileged matters, 1681
 Rule requiring answers to all questions, 1675, 1676
 Trade secrets, 1682
Competency and relevancy of questions, 1675, 1676
Cross-examination, see CROSS-EXAMINATION
Duty of witness to appear for examination in another district, 1692

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

PROCEEDINGS BEFORE EXAMINER—continued

Duty of witness to appear and testify, 1674

English practice:

- Alterations in deposition, 1638
 - Conduct of examination, 1637
 - Examination of witnesses, 1637
 - Filing interrogatories, 1636
 - Notice of time to attend, 1636
 - Procuring attendance of witness, 1636
 - Propriety of proceeding, 1634
 - Reading deposition to witness, 1638
 - Reading interrogatories, 1637
 - Right of parties and counsel to attend, 1637
 - Signature of witness to deposition, 1638
 - Swearing witness, 1635
 - Use of memoranda by witness, 1637
- Equity rule 67 generally, 1667-1672
- Examination in another district generally, 1690-1693
- Expenses of examination, 1689
- Federal practice in general, 1665-1693
- Fees and costs of examination, 1689
- Inference from refusal of witness to answer, 1683
- Interrogatories oral or written, 1666
- Jurisdiction of court where examination taken
- Notice of commission, 1672
- Objections to questions and answers, 1675, 1676
- Origin of practice, 1666
- Payment of fees, costs, and expenses, 1689
- Refusal to answer on advice of counsel, 1678
- Return of deposition into court, see DEPOSITIONS
- Right of parties and counsel to participate, 1666
- Signature of witness to deposition, 1637
- Subpoena *duces tecum*, see SUBPOENA DUCES TECUM
- Summoning witness to appear, 1673
- Taking testimony outside of district, 1668, 1669
- Usual method of taking evidence, 1666

PROCEEDINGS BEFORE MASTER:

See REFERENCE

PROCESS:

- Additional process for new parties, 611
- Amendments, see AMENDMENT
- Means, forms of, 8
- New process on supplemental proceedings after decree, 612
- Prayer for, see PRAYER FOR PROCESS
- Service, see SERVICE OF PROCESS
- Subpoena, writ of, see SUBPOENA, WRIT OR

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

PROCESS — *continued*

- Supplemental bill, 611, 1194
- Validity of process issued before amendment, 1103

PROCHEIN AMI:

See **NEXT FRIEND**

PRO CONFESSO:

See **TAKING BILL Pro CONFESSO**

PRODUCTION OF DOCUMENTS:

- Admissibility of documents as evidence, 1894
- Affidavit, 1888-1893
- Answer of defendant, 1883, 1884
- Charging documents in bill, 1882
- Conclusiveness of defendant's admissions or denials, 1884
- Defendant's possession and control of documents, 1887
- Framing bill, 1882
- Joint control of several persons, 1887
- Law courts, 1862
- Motion and affidavit, 1888-1893
- On reference to master, 1444, 1445, 1895, 1896
- Order of production, 1885
- Order where witness in court, 1885
- Privileged documents, 1886
- Production on motion and affidavit:
 - Considerations favoring liberal practice, 1891
 - Diversity of practice in federal courts, 1889
 - Effect of waiving defendant's oath, 1890
 - English practice, 1888
 - Limitation of right, 1892
 - Necessity of answer by defendant, 1893
- Proving documents, 1894
- Right to compel production by defendant, 1881
- Subpoena duces tecum, see **SUBPOENA DUCES TECUM**
- Time to procure, 1887
- Use of bill of discovery, 1887
- Use of documents at hearing, 1894

PROLIXITY:

Distinguished from impertinence, 292

PROMISSORY NOTES:

Proof as exhibits, 1621

PUBLICATION:

Service of process by, 628
Testimony, see **PUBLICATION OF TESTIMONY**

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1615-2284; III, §§ 2285-2887.]

PUBLICATION OF TESTIMONY:

- Consent or order of court, 1754, 1755
- Defects waived by consent publication, 1756
- Definition, 1753
- Effect of order on time for taking testimony, 1753
- English practice, 1754
- Enlargement of publication, 1753
- Equity rule, 1754
- Examination of new witnesses after publication:
 - Discretion of court, 1764
 - General rule, 1763
- Practice in federal courts generally, 1755
- Re-examination of witnesses after publication, 1759-1762
- Testimony *de bene esse*, 1757, 1758
- Testimony taken on bill to perpetuate, 1775
- Time for ordering, 1754

PUBLIC CORPORATIONS:

- Rates of jurisdiction of equity, 74-76

PURCHASER, BONA FIDE:

- See **BONA FIDE PURCHASE**

QUESTIONS OF LAW AND FACT:

- Submission to jury, 1524

QUIETING TITLE:

- Allegations of bill, certainty of, 195
- Cross bill, allegations in regard to possession, 1852
- Ejectment, remedy by, 61
- Ejectment, when not complete remedy, 62
- Jurisdiction in general, 61
- Parties necessary in suit for, 511
- State statutes, effect of, 63

RAILWAYS:

- Rates, jurisdiction of equity in suits concerning, 74

RATES:

- Jurisdiction of controversy as to rates charged by public corporations, 74-76

RATIFICATION:

- Acts of receivers, 2635

REARGUMENT (see also REHEARING):

- Grounds for reargument of cause, 2097
- Petition for leave to reargue cause, 2096
- Supreme Court, 2115

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

REBELLION, COMMISSION OF:
See **COMMISSION OF REBELLION**

RECEIPTS:
Proof as exhibits, 1621

- RECEIVERS:**
- Abatement of pending suits, 2569, 2570
 - Accounting:
 - Ancillary receivers, 2706
 - Books relating to receivership, 2714
 - Burden of proof, 2719
 - Committal of receiver for contempt, 2735
 - Compensation of master passing on accounts, 2774
 - Counsel fees:
 - Allowance of proper counsel fees, 2726
 - Duties devolving on receiver, 2727
 - Fees of intervening petitioner, 2728
 - Unnecessary employment of counsel, 2727
 - Duty of receiver to account, 2712
 - Estoppel to question expenses incurred by request, 2723
 - Expenditures beyond scope of authority, 2721
 - Expenditures by railroad receivers, 2720, 2721
 - Expenditures not wholly for benefit of trust, 2722
 - Expenses incurred at request of parties, 2723
 - Form of account generally, 2713
 - General principles as to allowance of claims, 2720
 - Interest on fund, 2729
 - Intervals of accounting, 2715
 - Losses chargeable to receiver, 2725
 - Mismanagement, effect of, 2725
 - Money stolen by subordinate, 2724
 - Notice of accounting, 2718
 - Office rent, 2721
 - Order for accounting, 2716
 - Reference to master, 2717
 - Reopening account, 2734
 - Review of master's report;
 - Character of report, 2733
 - English practice, 2731
 - Exceptions to report, 2731, 2732
 - Federal practice, 2732
 - Scope of review, 2732
 - Submission of draft report, 2730
 - Time of accounting, 2715
 - Traveling expenses, 2720
 - Vouchers, 2714
 - Actions, see *infra*, Suits against receiver; Suits by receiver

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.)

RECEIVERS — continued

Ancillary receivers:

- Accounting in respective courts, 2708
- Appointment of same receiver as in principal cause, 2697
- Appointment to sue in foreign court, 2692
- Capacity in which receiver must sue, 2701
- Corporate property outside of domicil, 2527
- Decree in principal suit as affecting proceedings, 2696
- Disposition of assets by ancillary court, 2703
- Distinct characters of principal and ancillary receiver, 2700
- Effect of discharge, 2711
- Establishment of claims in ancillary court, 2708
- Evidence of necessity for appointment, 2696
- Exclusiveness of jurisdiction of principal and ancillary courts, 2704
- Jurisdiction in ancillary proceedings, 2694
- Necessity for ancillary receiverhip, 2693
- Necessity of pending ancillary suit, 2542
- Order for transmission of assets to principal court, 2709
- Persons entitled to procure appointment, 2695
- Powers and authority, 2699
- Preference of local creditors, 2707
- Proceedings in state courts, 2692
- Protection of local creditors, 2710
- Restrictions to acts authorized by appointing court, 2702
- Spheres of respective courts, 2705
- Sureties, 2698

Ancillary suits by or against, 1244

Answer:

- Proceedings for interlocutory discharge, 2708
- Weight of answer, 2556

Appeals:

- Decree affecting rights of parties, 2805
- Decree affecting trust estate, 2806
- Discharge of receiver, 2799
- Leave of court, 2806
- Order appointing receiver, 1938, 2563
- Order of discharge or removal, 2804
- Order or decree affecting receiver personally, 2804
- Order removing receiver, 2793
- Refusal to allow compensation, 2804
- Right of receiver generally, 2804-2806

Appointment:

- Additional receivers, 2566
- Ancillary appointment of receiver in principal cause, 2697
- Ancillary receiver for corporate property outside of domicil, 2527
- Ancillary receiver to sue in foreign court, 2692
- Application before formal filing of bill, 2543
- By court of own motion, 2547

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

RECEIVERS — *continued*

Appointment — *continued*

- Confirmation of appointment as cure of irregularities, 2558
- Consent of parties, 2511
- Considerations bearing on exercise of discretion, 2512
- Discretion of court, 2510
- Effect, see *infra*, Effect and incidents of receivership
- Form of order, see FORMS
- Grounds, see *infra*, Grounds for appointment
- Jurisdiction to appoint, see *infra*, Jurisdiction
- Laches in prosecution of suit, effect of, 2518
- Managing receivers, 2519-2531
- Motion, 2548
- Nature of receivership proceedings in general, 2507
- Notice of application, see *infra*, Notice of application
- Objections to appointment, 2523
- On filing bill of review, 2128
- Order appointing, see *infra*, Order appointing receiver
- Petition, 2548
- Power of equity courts generally, 2506
- Prayer, 2547
- Qualifications, see *infra*, Qualifications for appointment
- Reappointment after discharge, 2798
- Requirement of pending suit, 2541-2543
- Same person in federal and state courts, 2581
- Scope of receivership in general, 2507
- State statutes, 2528
- Terms and conditions, 2560, 2561
- Who may apply for appointment, 2544

Authority of receiver, see *infra*, Powers of receiver

Bill:

- Allegations of title to independent equitable relief, 2524
- Necessity for filing bill, 2541
- Necessity of showing jurisdiction, 2522
- Party entitled to maintain bill, 2544-2546
- Prayer, 2547

Bond:

- Action on receiver's bond, 2807, 2808
- Discretion to require bond, 2560
- Effect of irregularities on liability, 2807
- Interlocutory discharge of receiver, 2797
- Necessity of bond to obtaining title to property, 2587, 2588
- Proceedings to enforce generally, 2808

Certificates:

- Application of proceeds, 2764
- Consent to issuance, 2763
- Consideration, 2757
- Construction of order authorizing issuance, 2765
- Definition, 2757

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

JIVERS — continued

Certificates — continued

- Delay in presentation, 2771
 - Enforcement of lien, 2769
 - Estoppel of party, 2768
 - Estoppel of purchaser, 2768
 - Hypothecation, 2759
 - Intervention by holder, 2770
 - Liability of receiver for misrepresentation, 2786
 - Lien on property, 2757
 - Negotiability, 2758
 - Notice of application for leave to issue, 2762
 - Petition for leave to issue, 2761
 - Power of court to authorize, 2757
 - Priority between certificates of different series, 2787
 - Sale at discount, 2759, 2760
 - Usury, 2760
 - Validity as affected by consent and estoppel, 2763
 - Validity as affected by order of issuance, 2758
- Compensation and expenses:*
- Additional allowances, 2783, 2784
 - Amount of compensation:*
 - Amount dependent on size of fund, 2779
 - Considerations affecting amount, 2780
 - Conventional allowance, 2770
 - Determination by court, 2772
 - Discretion of lower court, 2778
 - Interlocutory and final allowances, 2782
 - Review of court's discretion, 2778
 - Waiver of objections by delay, 2785
 - Appeal by receiver, 2804
 - Apportionment among different funds, 2776
 - Charge against fund, 2773
 - Charge against plaintiff, 2775
 - Determination of amount by court, 2772
 - Effect of agreement to waive compensation, 2786
 - Forfeiture of compensation, 2787
 - Interlocutory allowances, 2782
 - Master passing on receivers' accounts, 2774
 - Notice of motion to fix, 2781
 - Preferential claim, 2737, 2740, 2741
 - Preliminary allowances, 2782
 - Revival of judgment for compensation, 2777
 - Right to reasonable compensation, 2772
 - Salary or lump sum, when proper, 2779
 - Services not contemplated in appointment, 2783, 2784
 - Taxation as costs, 2773
 - Time for final allowances, 2782
 - Concurrent suits, 2537

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

RECEIVERS — *continued*

 Conditions of appointment, 2560, 2561

 Conflict of jurisdiction:

 Concurrent suits, 2537

 Exclusive authority of court first acquiring jurisdiction over res, 2529-2531

 General principles, 2535

 Injunction against suit in state court, 2538

 Invalid receivership, 2536

 State and federal courts, 2532

 Time when exclusive jurisdiction attaches, 2533, 2534

 Vindication of state court's jurisdiction, 2538

 Consent to appointment, 2511

 Contempt of court:

 Committal of receiver for disobedience to order, 2735

 Interference with receiver's possession, 2597, 2598

 Suit against receiver without leave, 2676

 Continuity of receiverships, 2584

 Contracts, disposition of, see *infra*, Disposition of existing contracts

 Control of court over receiver:

 Application for specific directions, 2615

 Chambers or open court, 2617

 Court to which receiver responsible, 2613

 Discretion of receiver, 2618

 Entry of order controlling receiver, 2615

Ea parte application, 2617

 Informal instructions, 2617

 Order of general instructions, 2615

 Propriety of formal motion, 2617

 Ratification of unauthorized act, 2635

 Relations between receiver and employees, 2619, 2621

 Right to apply for instructions, 2615

 Supervisory authority of court, 2614

 Control over defendant's property:

 Nature of property subject to receivership, 2565

 Property outside of territorial jurisdiction, 2525

 Title, interest, and possession, see *infra*, Title, interest, and possession of receiver

 Corporations:

 Effect of receivership on corporate existence and liability, 2567

 Effect of receivership on election of corporate officers, 2568

 Costs:

 Preferential claim, 2737

 Reimbursement, 2041

 Counsel, employment of, see *infra*, Powers of receiver

 Counsel fees:

 Allowance of proper counsel fees, 2726

 Duties devolving on receiver, 2727

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

RECEIVERS — continued

Counsel fees — continued

- Fees of intervening petitioner, 2728
- Preferential claim, 2737
- Unnecessary employment of counsel, 2727

Counterclaim against intervenor, 2573

Definition, 2805

Discharge:

- Appeals, 2799, 2804
- Assumption of obligation by successor, 2803
- By court of own motion, 2794
- Discretion of court, 2799
- Duty to hasten time of discharge, 2794
- Effect of discharge of ancillary receivers, 2711
- Final discharge:
 - Effect on liability of receiver, 2801
 - Reservation of subsequent claims, 2802

Interlocutory discharge:

- Application, 2796
- Grounds for order, 2795
- Procedure to procure, 2796
- Restoration of property, 2797
- Terms and conditions, 2797

Modes of discharge, 2795

Pending suit against receiver, 2800

Restoration after discharge, 2798

Temporary character of receivership proceedings, 2794

Discretion of court:

- Adoption of existing contract, 2841
- Appointment of receivers generally, 2510
- Bond, 2560
- Compensation of receiver, 2778
- Consideration of inconvenience to parties, 2516
- Considerations bearing on discretion, 2512
- Discharge of receiver, 2799
- Equity of plaintiff's cause, 2517
- Grant of leave to sue receiver, 2679
- Laches, 2518
- Necessity of appointment controlling, 2512, 2513, 2514
- Removal of receiver, 2789
- Specific performance of existing contract, 2643
- Terms and conditions of appointment, 2560

Discretion of receiver:

- Adoption of existing contract, 2841
- Carrying out general instructions of court, 2618
- Continuation of prior regulations, 2623
- Review of discretion as to wages, 2621

Disposition of existing contracts:

- Adoption of contract by receiver, 2841

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

RECEIVERS — *continued*

Disposition of existing contracts — *continued*

- Claim for prior tort or breach of contract, 2644
- Consequences of doctrine that receiver not bound, 2640
- Discretion of court as to adoption of contract, 2641
- Petition for specific performance, 2642, 2643
- Preference of claims, see *infra*, Preferential claims
- Prior judgment, 2644
- Receiver not bound by prior executory contract, 2639

Disposition of existing leases:

- Implied adoption of lease from retention of premises, 2649
- Injunction to enforce specific performance of lease, 2651
- Liability of receiver as lessee, 2645, 2646
- Possession of premises as affecting adoption of lease, 2650
- Right to take possession of leasehold, 2647
- Time for adoption or rejection of leases, 2648

Disposition of prior liens, see *infra*, Liens on receivership property

Dissolution of receivership, see *supra*, Discharge

Effect and incidents of receivership:

- Abatement of pending suit, 2570
- Conclusion of receiver by prior steps in litigation, 2572
- Control of court over receiver, see *supra*, Control of court over receiver
- Control over defendant's property, see *supra*, Control over defendant's property
- Corporate existence and liability, 2567
- Election of corporate officers, 2568
- Making receiver party to pending suit, 2571
- Pending suits generally, 2569
- Right to counterclaim or set-off, 2573

Eligibility, see *infra*, Qualifications for appointment

Employment of counsel, see *infra*, Powers of receiver

Exclusive jurisdiction, see *supra*, Conflict of jurisdiction

***Ex parte* application, 2551**

Expenses of receivership, see *supra*, Compensation and expenses

Foreclosure proceedings:

- Scope of receivership, 2564, 2566

Foreign, capacity to sue, 452

Forms relating to, see Forms

General receivers, 2508

Grounds for appointment:

- Apprehension of immediate loss, 2512
- Dispute as to title, 2514
- Insolvency of defendant, 2515
- Right to independent equitable relief, 2524
- Subject matter of perishable nature, 2512

Hearing on application:

- Defendant's showing, 2555
- Interlocutory character, 2553
- Plaintiff's showing, 2554
- Subsequent hearing after *ex parte* application, 2552

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

RECEIVERS — continued

 Incumbrances on property, see *infra*, Liens on receivership property

 Injunction:

 Against stilt in State court, 2538

 Compelling performance of lease, 2651

 Interference with receiver's possession, 2599, 2600

 Right of state court to enjoin receiver without leave, 2689

 Insolvency of defendant, 2515

 Interest as affecting eligibility, see *infra*, Qualifications for appointment

 Interest of receiver after appointment, see *infra*, Title, interest, and possession of receiver

 Interest on fund at accounting, 2729

 Intervention by lienors, 2605

 Jurisdiction:

 Ancillary proceedings, 1229, 1244, 2694

 Citizenship as affecting jurisdiction, 2690, 2691

 Conflict, see *supra*, Conflict of jurisdiction

 Court having jurisdiction to appoint, 2522

 District in which receiver may be appointed, 2526

 Domicil of corporation, 2627

 Effect of remedy at law, 2528

 Limit of jurisdiction over property, 2526

 Necessity of showing jurisdiction on bill, 2522

 Principal and ancillary courts, 2704

 Removal of receiver, 2789

 Suits by or against receivers, 2690, 2691

 Waiver of right to be sued in particular district, 2526

 Jurisdiction of ancillary receivership proceedings, 1229, 1244, 2694

 Lease of property:

 Compensation to lessee for lease, 2637

 Disposition of existing leases, see *supra*, Disposition of existing leases

 Order authorizing lease, 2638

 Validity, 2637

 Leave of court:

 Enforcement of liens, 2608, 2609

 Interference with property in possession of receiver, 2602-2604

 Issuance of certificates, 2761

 Leave to appeal, 2806

 Leave to receiver to sue, 2658, 2659

 Suits against receiver, see *infra*, Suits against receiver

 Liability:

 Assumption of personal liability by receiver, 2676

 Contract or tort, 2583

 Effect of final discharge, 2801

 Mismanagement of assets and funds, 2725

 Misrepresentation in certificates, 2766

 Payment of debts after wasting funds, 2735

 Receiver's liability on prior lease, 2645, 2646

{References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.}

RECEIVERS — continued

Liens on receivership property:

- Certificates, 2757
- Compliance with order to surrender, 2611
- Conduct of proceedings with reference to liens, 2605
- Control of court over lien claims, 2606
- Estoppel of purchaser to question lien, 2657
- Intervention *pro interessu suo*, 2605
- Mechanics' liens, 2809
- Notice to lienors, 2605
- Order for surrender of property to claimant, 2610, 2611
- Permission to enforce lien directly, 2608, 2609
- Practice as to satisfaction of prior liens, 2607
- Reimbursement for property wrongfully appropriated by receiver, 2612
- Reservation on sale of property, 2658

Managing receivers:

- Private business, 2521
- Public corporations, 2520
- Qualifications, 2578
- Reluctance of courts to appoint, 2519

Master and servant, see *infra*, Relations between receiver and employees

Motion or petition:

- Discharge of receiver, 2796
- Issuance of certificates, 2761
- Propriety and form in general, 2548
- Summary petition to enforce delivery of property, 2592

Multifariousness in suits by, 431

Nature and object of proceedings, 2794

Notice of application:

- Discharge of receiver, 2796
- Ea parte* application, 2551
- Leave to issue certificates, 2762
- Lienors, 2605
- Necessity in general, 2549
- Persons not parties to suit, 2560

Objection to appointment for remedy at law, 2523

Operating receivers, qualifications of, 2578

Order appointing receiver:

- Appeal from order, 1938, 2563
- Collateral attack, 2524, 2559
- Condition for diligence in prosecution, 2794
- Defining extent of receiver's powers, 2627
- Defining scope of receivership, 2564
- Description of property, 2564
- Effect of irregularities in proceedings, 2568
- Extraterritorial operation, 2525
- Form of order, see FORMS
- Interlocutory character, 2562

Eq. Prac. Vol. III.—130.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

RECEIVERS — *continued*

 Order appointing receiver — *continued*

 Provisional order before bill filed, 2543

 Status of property fixed by, 2586

 Parties:

 Bringing in stranger to obtain possession, 2594

 Insolvent company, 2546

 Owner or possessor of property, 2545

 Pending suits, 2571

 Suits by receivers generally, 2665

 Who may apply for appointment generally, 2544

 Pending suits:

 Abatement, 2569, 2570

 Discharge pending suit, 2800

 Effect of receivership generally, 2569

 Jointer of receiver as party, 2571

 Permanent receivers, 2509

 Petition, *see supra*, Motion or petition

 Petition *pro interesse suo*, 1367, 2605

 Possession, *see infra*, Proceedings to obtain and protect possession; Title, interest, and possession of receiver

 Powers of receiver:

 Ancillary receivers, 2699

 Appointment of agents, 2630

 Assumption of personal liability, 2626

 Court as source of receiver's authority, 2625

 Disposition of existing contracts, *see supra*, Disposition of existing contracts

 Disposition of existing leases, *see supra*, Disposition of existing leases

 Division of authority by co-receivers, 2628

 Employment of counsel:

 Discharge and substitution of counsel, 2633

 Implied authority, 2631

 Receiver himself a lawyer, 2632

 Who may be employed, 2632

 Employment of help, 2630

 Incidental and implied powers generally, 2629

 Leases prior to receivership, *see supra*, Disposition of existing leases

 Leases, power to make, 2637, 2638

 Making new executory contract, 2634

 Objection by party to transaction, 2636

 Order defining extent of powers, 2627

 Ratification by court of unauthorized act, 2635

 Right to sue in general, 2659

 Prayer, necessity of special, 2547

 Preferential claims:

 Advancements by parties, 2746

 Advertising bills, 2741

 Betterments, 2744, 2745

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

RECEIVERS — *continued*

Preferential claims — *continued*

- Certificates of different series, 2767
- Charges arising prior to receivership:
 - Basis of court's power, 2748
 - Construction expenses, 2751
 - Debts chargeable against current account, 2751, 2752
 - Determination of question of priority, 2756
 - Diversion of income as affecting right, 2753
 - Equipment, 2751
 - Failure to foreclose as affecting right, 2754
 - Ground for preference, 2752
 - Improvements, 2751
 - Interlocutory and final orders, 2756
 - Limitation of court's power, 2747, 2750
 - Origin and development of doctrine, 2749, 2750
 - Period for which preference may be given, 2755
 - Power of court, 2747, 2748
 - Rental or terminal facilities, 2751
- Consent to creation of preference, 2746, 2746
- Costs, 2737
- Counsel fees, 2737
- Damages for injury to person or property, 2742
- Debts for supplies, 2741
- Expenses of receivership, 2737, 2740, 2741
- Final distribution of receivership funds, 2736
- Improvements, 2744, 2745
- Operating expenses, 2740, 2741
- Public and private corporations, 2745, 2746
- Ratification of payment by receiver, 2743
- Taxes, 2738
- Time of payment, 2743
- Wages of laborers, 2741

Priorities between claims, see *supra*, Preferential claims
Proceedings to obtain and protect possession:

- Bringing in stranger as defendant in main suit, 2594
- Contempt proceedings, 2597, 2598
- Control of court over receiver's suit, 2596
- Duty to surrender possession, 2591
- Independent suit, 2593
- Injunction, 2599, 2600
- Order for possession, 2590
- Petition in case of conflicting receiverships, 2601
- Seizure by receiver, 2589
- Summary petition to enforce delivery, 2592
- Waiver of informality, 2595

Proving claims before master in receivership proceedings, 1386
Purpose of receivership, 2505

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2235-2897.]

RECEIVERS — *continued*

Qualifications for appointment:

- Appointment of same person in federal and state courts, 2581
- Disinterestedness, 2574
- Eligibility of corporate officer or stockholder, 2576
- Interest in reorganization scheme, 2580
- Interest not disqualifying, 2577
- Managing receivers, 2578
- Operating receiver, 2578
- Persons ineligible because of interest, 2575
- Residence as affecting eligibility, 2579

Ratification of unauthorized act by court, 2635

Reappointment after discharge, 2798

Receivership and injunction contrasted, 2505

Reference:

- Accounts of receiver, 2717
- Application for removal of receiver, 2792
- Reimbursement for costs, 2641
- Reimbursement for property wrongfully taken, 2612
- Relations between receiver and employees:

- Continuation of prior regulations, 2623
- Gratuitous assistance of employee, 2624
- In general, 2624
- Necessity of formal pleadings, 2620
- Notice of cutting wages, 2622
- Petition of employees to court, 2619
- Review of receiver's discretion as to wages, 2621

Remedy at law, effect on validity of order appointing receiver, 2523

Removal:

- Appeal by receiver, 2793, 2804
- Application for removal, 2789, 2790
- Burden of proof, 2791
- Discretion of court, 2789
- Grounds for removal in general, 2788
- Jurisdiction to remove, 2789
- Reference to ascertain truth of charges, 2792
- Sufficiency of charges, 2790

Replication, effect of failure to file, 285

Residence as affecting eligibility, 2579

Restoration of receivership after discharge, 2798

Right to be heard on motion, 1277

Sales of receivership property:

- Charging property in hands of purchaser, 2656
- Completion of sale, 2652
- Conduct of sale, 2652
- Deed to purchaser, 2655
- Effect of irregularities on title of purchaser, 2654
- Estoppel of purchaser to question lien, 2657

INDEX.

2069

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2285-2897.]

RECEIVERS — *continued*

Sales of receivership property — *continued*

Opening for bidders, 2652

Receiver holding as agent for purchaser, 2653

Reservation of prior liens on claims, 2656

Time when bidder becomes purchaser, 2652

Scope of receivership:

Extension to property and possession of stranger, 2594

Foreclosure suits, 2564, 2566

Nature of property subject to receivership, 2565

Order extending scope, 2566

Property included in receivership, 2564

Set-off against intervenor, 2573

Special receivers, 2508

State laws:

Amenability of receiver to state laws, 2539

Conformity with state statutes, 2540

Effect on appointment, 2528

Receivers' certificates, 2760

Suits against receiver:

Acts done in private capacity, 2678

Basis of immunity from suit without leave, 2677

Citizenship of receiver as affecting jurisdiction, 2691

Conformity to ordinary procedure, 2663

Foreign court, 2680

Form of process, 2684

Jurisdiction, 2690, 2691

Leave of court:

Basis of requirement, 2677

Conditions of granting leave, 2682

Contempt in suing without leave, 2676

Discretion of court, 2679

Foreign court, 2680

Necessity of leave, 2676

Order granting general leave, 2681

Private acts and requirements, 2678

Waiver of objection, 2676

Manner of defending, 2683

Necessity of showing acts of equitable cognizance, 2683

Statutory right to sue without leave:

Act of Aug. 13, 1888, 2685

Causes of action arising before receivership, 2686

Counterclaim, 2686

Court in which suit may be brought, 2687

Garnishment proceeding, 2686

Injunction by state court against receiver, 2689

Limitation of right, 2688

Nature of acts on which receiver suable, 2686

Set-off, 2686

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

RECEIVERS — *continued*

Suits by receiver:

- Allegations of representative capacity, 2667
- Citizenship of receiver as affecting jurisdiction, 2691
- County, 2671
- Creditors of corporation under receivership, 2665
- Defenses available, 2668
- Disability of appointing court to authorize foreign suit, 2670
- Doctrine of federal courts generally, 2670
- Doctrine of state court, 2671
- Effect of assignment to receiver, 2675
- Exceptions to general rule, 2674

Foreign courts:

- Ancillary receivers, 2692
- General authority to sue, 2659
- Jurisdiction, 2690, 2691
- Leave of court, 2658, 2659

Name in which suit brought:

- Action in right of receiver, 2661
- Action in right of trust estate, 2662
- Conflict of decisions, 2660
- In general, 2660
- Law and equity, 2663
- Nature of receivership as affecting question, 2664
- Necessity for express authority to sue, 2658
- Orders incident to allowing suit, 2666
- Parties to suit, 2665
- Proceedings to obtain and protect possession, see *supra*, Proceedings to obtain and protect possession
- Refusal of receiver to sue, 2669
- Right to sue in general, 2659
- Special authority to sue, 2659
- Validity of decree rendered without objection, 2672
- What courts considered foreign, 2673

Taxes:

- Petition for relief against taxes, 2739
- Preferential claim, 2738

Temporary receivers, 2509

Terms and conditions of appointment:

- Discretion of court, 2560
- Stipulation assuming condition, 2561

Title, interest, and possession of receiver:

- Conflicting receiverships, 2601
- Duty to surrender possession to receiver, 2591
- Exemption of property from judicial process, 2602, 2603
- Fiduciary nature of receiver's interest, 2582
- Leasehold property, 2647
- Nature of receiver's possession, 2597
- Necessity of giving bond, 2587, 2588

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

RECEIVERS — *continued*

- Title, interest and possession of receiver — *continued*
 Order to take possession, 2590
 Possession of receiver is possession of court, 2585
 Power of trustee to deal with receivership property, 2604
 Proceedings in relation to possession, see *supra*, Proceedings to obtain and protect possession
 Property beyond jurisdiction of court, 2588
 Protection of receiver by court, 2598
 Relation of title to order of appointment, 2586
 Representative capacity of receiver, 2583
 Seizure of receiver, 2589
 Successive receivership, 2584
 Summary petition to enforce delivery of property, 2592
Union of offices of master and receiver, 1395
Wages:
 Cutting wages, 2622
 Preferential claims, 2741

RECITALS:

- Decree, recitals of, 1963
Documents, 279
Order of reference, recitals as to evidence, 1434

RECORD:

- Evidence excluded at hearing, 1921
Proof as exhibits, 1621
Substitution of record, 1915
Taking from clerk's office 285

REDEMPTION:

- Bill to redeem, costs on, 2003
Foreclosure proceedings:
 After sale complete, 2873
 Before sale, 2857

REDESDALE, LORD:

- Authority of treatise on equity pleading, 121

REDUNDANCY:

- Distinguished from impertinence, 292

REFEREE IN BANKRUPTCY:

- Power to pass on competency and propriety of testimony, 1679

REFERENCE (see also MASTER IN CHANCERY):

- Accounts and accounting:
 Bringing in accounts before master, see *infra*, Pleadings before master
 Computation of interest, 1433

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2807.]

REFERENCE — *continued*

Accounts and accounting — *continued*

- Discretion of court, 1405
- Duty to refer, 1400
- Partial payments, 1433
- Receivers' accounts, 2717
- Referability, 1399
- Requisites of report, 1454
- Scope of reference, 1424
- Time of ordering reference, 1411

Adjournment, 1420

- Annuities, ascertaining value of, 1399
- Appeal from order of reference, 1413, 1414, 1938
- Application for removal of receiver, 2792
- Bringing reference before master, 1418
- Compensation of master, see MASTER IN CHANCERY
- Conduct of reference:
 - Adjournment of hearing, 1420
 - Control of court over proceedings, 1425, 1503
 - Discretion of master, 1419, 1420
 - Equity rules, 1419
 - Evidence, see *infra*, Evidence before master
 - Impartiality required of master, 1421
 - Judicial principles, 1420
 - Master concluded by decree of reference, 1423
 - Persons entitled to attend, 1426-1428
 - Pleadings before master, see *infra*, Pleadings before master

Confirmation of report:

- Certificates of performance of interlocutory acts, 1500
- Effect on weight of findings, 1514
- Equity rule, 1501
- Hearing on further directions, 1504, 1505
- Mode of confirmation, 1501
- Motion to confirm, 1501, 1502
- Necessity, 1500
- Petition to confirm, 1502
- Reservation of further directions, 1503
- Time of confirmation, 1501

Consent:

- Reference of whole cause, 1406, 1516
- Scope not enlarged by consent, 1422

Contempt proceedings:

- Refusal to answer before examiner, 1677, 1685
- Right to order reference to master, 2477

Costs:

- Reference ordered by both parties, 2023
- Stenographers' fees, 1987

Damages, reference to ascertain, 1399

Determination of plea of another suit pending or *res judicata*, 915, 916

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

REFERENCE — *continued*

- Discovery of documents for use as evidence, 1444, 1445
- Discretion of court in ordering reference, 1405
- Evidence before master:
 - Admissibility, 1446-1448
 - Affidavits, 1442
 - Certainty, 1449
 - Compelling witnesses to appear, 1436
 - Discovery of documents, 1444, 1445
 - Discretion as to mode of taking proof, 1440
 - Discretion as to time of taking proof, 1439
 - Documentary evidence, 1443
 - Equity rules, 1434, 1436
 - Evidence taken in main cause, 1434, 1435
 - Examination of witness who has previously given deposition, 1437
 - Exceptions to admissibility, 1446
 - Interrogatories, 1441
 - Master's ruling on admissibility, 1448
 - Opinion evidence, weight of, 1450
 - Order of proof, 1440
 - Payment of expenses, 1469
 - Place of taking testimony, 1438
 - Powers of master in general, 1436
 - Production of documents, 1444, 1445, 1896
 - Recommittal, evidence on, 1490
 - Reopening reference for reargument on new evidence, 1461
 - Sufficiency, 1449
 - Time for putting in proof, 1439
 - Evidence, propriety of reference to take and report, 1399, 1401
 - Exceptions for insufficiency of discovery by answer, 779, 780
- Exceptions to report:
 - Amendment of exceptions, 1489
 - Conclusiveness of report in absence of objection, 1471
 - Definiteness and certainty, 1485, 1487
 - Disposition of exceptions, 1491
 - Errors constituting grounds of exception in general, 1477
 - Errors not affecting result reached, 1477, 1496
 - Evidence considered on hearing, 1490
 - Extension of time for taking, 1480
 - Failure to find material facts, 1477
 - Failure to report evidence, 1460
 - General exceptions, 1486
 - Hearing on exceptions generally, 1490-1492
 - Nature and office, 1475
 - Necessity for taking, 1476
- Objections:
 - Diversity of practice in circuit courts, 1484
 - Effect of equity rule, 1483
 - Necessity as foundation for exceptions, 1482

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

REFERENCE — *continued*

- Exceptions to report — *continued*
 - Petition to recommit distinguished from exceptions, 1473
 - Purpose, 1475
 - Reconsideration of order of reference, 1492
 - Reference to record, 1488
 - Scope, 1475, 1478
 - Special exceptions, 1485
 - Specifying particular portions of evidence, 1488
 - Sufficiency in general, 1485-1489
 - Time for taking, 1479, 1480
 - Waiver, 1481
 - Want of oath, 1396
 - Withdrawal, 1481
- Interest, computation of, 1399, 1433
- Interrogatories, 1403, 1441
- Liens, reference to ascertain, 1399
- Matters referable to master:
 - Accounts and accounting, 1399, 1400
 - Amounts due to creditors, 1404
 - Application of proceeds of foreclosure sale, 2883
 - Ascertaining of liens, 1399
 - Ascertaining value of annuities, 1399
 - Clerical act, 1402
 - Computation of damage, 1399
 - Computation of interest, 1399
 - Incumbrances on land, 1404
 - Inquiries as to persons entitled to fund in court, 1404
 - Interrogatories, 1403
 - Investment of money, 1404
 - Names, priorities, and equities of creditors, 1404
 - Perfection of pleadings, 1403
 - Questions in regard to assets, 1404
 - Taking and reporting testimony, 1399, 1401
 - Taking bill *pro confesso*, 1569, 1570
- Motion:
 - Recommittal to master, 1473
 - Who may make, 1408
- Notice:
 - Bringing in accounts, 1432
 - Equity rule, 1426
 - Persons entitled to notice of hearing, 1426, 1428
 - Reference on decree *pro confesso*, 1428
- Order:
 - Appeal from order, 1413, 1414
 - Conformity of issues in suit, 1415
 - Defining scope of reference, 1409, 1415
 - Directions to master, 1415

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

REFERENCE — continued

Order — continued

- Exclusion of particular matters, 1415
- Interlocutory or final, 1413, 1414
- Modification on motion, 1417
- Recital as to evidence in main cause, 1434
- Reconsideration of order on exceptions to report, 1492
- Requirement as to reporting testimony, 1416
- Settling interrogatories, 1441
- Time of making, see *infra*, Time of ordering
- Who may move for order, 1408

Parties:

- Discretion of master, 1427
- Necessary parties generally, 1426
- Persons entitled to attend generally, 1426-1428
- Reference on decree *pro confesso*, 1428

Perfecting in general, 1418

Perfection of pleadings, 1403

Performance of clerical act, 1402

Petition, 1299

Petition of intervention *pro interesse suo*, see INTERVENTION

Pleadings before master:

Bringing in accounts:

- Charge and discharge, 1432
- Computation of interest, 1433
- Equity rule, 1430
- Itemization, 1431
- Notice to opposite party, 1432
- Partial payments on account, 1433
- Schedule, 1431

State of facts, 1429

Plea of another suit pending, reference to ascertain truth, 915, 916

Presentation to master, 1418

Proceedings before master:

Conduct of reference generally, see *supra*, Conduct of reference

Evidence, see *supra*, Evidence before master

Exceptions to interrogatories, 1441

Order settling interrogatories, 1441

Pleadings, see *supra*, Pleadings before master

Record of proceedings, 1472

Revision of master's acts during progress of reference, 1425

Production of documents before master (see also PRODUCTION or DOCUMENTS):

English practice, 1445, 1895

Federal practice under equity rule, 1444, 1896

Purpose, 1486

Receivers:

Accounts of receiver, 2717

Application for removal of receiver, 2792

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1013-2234; III, §§ 2235-2897.]

REFERENCE — continued

Recommittal of report:

- Allowance of order, 1494
- Appointment of new master, 1498
- Court's own motion, 1497
- Discretion of court, 1494
- Errors not causing prejudice, 1496
- Evidence on recommittal, 1499
- Grounds generally, 1494
- Matter waived or omitted by negligence, 1495
- Motion to recommit, 1493

Reopening, 1461

Report:

- Accompanying report by evidence, 1469
- Advisory character, 1469
- Amendment after filing, 1464, 1466
- Amendment by master, 1461
- Clearness, certainty, and directness, 1451
- Confirmation, see *supra*, Confirmation of report
- Correction of errors on face of report, 1474
- Damages permissible on recommittal, 1466
- Definiteness and certainty, 1451, 1454
- Duty to report conclusions of fact, 1452
- Effect of use by master of documents not admissible as evidence, 1447
- Equity rule as to recitals, 1458
- Evidence in main cause as basis for report, 1434
- Exceptions to report, see *supra*, Exceptions to report
- Filing, 1462, 1463
- Form in general, 1457
- Fullness, 1454
- Inferences of fact and law, 1453
- Leave of court to withdraw, 1465
- Limitation to issues of suit, 1456
- Limitation to matters referred, 1455
- Motion to recommit, 1493
- Motion to set aside, 1493
- Motion to vary, 1493
- Oath, 1396
- Objections:
 - Diversity of practice in circuit courts, 1484
 - Equity rule, 1483
 - Errors not causing prejudice, 1496
 - Exceptions, see *supra*, Exceptions to report
 - Necessity as foundation of exceptions, 1482
 - Want of oath, 1396
- Paging, 1457
- Paragraphing, 1457
- Partial reports, 1459

[References are to sections, Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

REFERENCE — *continued*

Report — *continued*

- Petition for review, 1493
- Precision, 1454
- Preparation in general, 1451
- Property right in, 1463
- Recital of contents of order of reference, 1458
- Recommittal, see *supra*, Recommittal of report
- Reconsideration, 1465
- Reference of whole cause, 1407, 1516-1519
- References to depositions, 1457
- References to record, 1457, 1472
- Requirement of order as to report, 1416
- Responsiveness to order of reference, 1457
- Review for error not apparent on face, 1493-1499
- Scandal and impertinence in, 1455
- Separate reports from time to time, 1459
- Submission of draft, 1462
- Surplusage, 1455
- Weight of findings, see *infra*, Weight of master's findings
- Withdrawal from files, 1465

Scope:

- Accounts and accounting, 1424
- Determination by pleadings and order, 1420, 1422, 1423
- Exceptions to report, 1475, 1478
- Propriety of reference to determine whole cause, 1406
- Reference of whole cause, 1407, 1516-1519

State of facts, 429

- Stenographer's fees as costs, 1987
- Taking and perfecting in general, 1408-1418
- Taking bill *pro confesso*, see TAKING BILL PRO CONFESSO

Time of ordering:

- Accounts and accounting, 1411
- After preliminary decree settling rights, 1410
- Equity rule, 1409
- Generally, 1409
- Objection for prematurity, 1412

Weight of master's findings:

- Advisory character of report, 1509
- Attitude of courts, 1506
- Comparison with verdict of jury, 1510, 1513
- Conclusiveness in supreme court, 1514
- Concurrence of master and court below, 1515
- Considerations bearing on weight generally, 1506, 1512
- Dependence on circumstances of particular case, 1506
- Impossibility of formulating universal rule, 1506
- Nature of confirmation of report, 1514
- Presumption in favor of findings, 1507, 1508

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

REFERENCE — continued

- Weight of master's findings — continued
 - Questions of fact, 1510-1512
 - Questions of law, 1515
 - Reference of whole cause, 1407, 1516-1519

REFORMATION:

- Allegations of bills reform sealed instrument, 194
- Ancillary proceeding to reform deed, 1236
- Removal of cause, reformation of bill, 1095

REHEARING:

- Appealable and nonappealable decrees, 2089, 2090
- Appeals:
 - Rehearing in appellate court, 2114
 - Rule of court, 2116
 - Supreme court, 2115
- Bill of review, bar by, 2139
- Determination of appealability of decree, 2090
- Discretion of court, 2093
- Equity rule, 2088
- Errors apparent on record, 2094
- Final decrees:
 - Determination of finality, 2090, 2091
 - Effect of right to appeal, 2088
- Grounds for rehearing generally, 2094
- Interlocutory decrees, 2092
- Motion, 2105
- New or newly discovered evidence:
 - Admissions, 2101
 - Bill of review, see BILL OF REVIEW
 - Conditions justifying allowance of petition, 2099
 - Conditions justifying denial of petition, 2100
 - Confessions, 2101
 - Cumulative evidence, 2101
 - Diligence required, 2102, 2103
 - Discretion of court, 2098
 - Effect of agreed statement of facts, 2103
 - Failure to introduce available evidence, 2103
 - Laches of applicant, 2103
 - Scope of rehearing, 2107
 - Supplemental bill, 2109
- Notice, 2104
- Number of hearings, 2113
- Order:
 - For supplemental bill, 2109
 - Incidental orders on granting of petition, 2108
 - To show cause, 2104

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

REHEARING — *continued*

Petition:

- Demurrer to petition, 2106
 - Dismissal without prejudice, 2107
 - Equity rule, 2088
 - Frame of petition, 2105
 - Interlocutory decree, 2092
 - Leave to reargue cause, 2096
 - Necessity for, 2105
 - Oath or affidavit, 2105
 - Petition to rehear treated as informal bill of review, 2174
 - Prayer, 2109
 - Taking advantage of defects, 2106
- Reargument, see REARGUMENT
- Scope, 2107
- Second rehearing, 2113
- Subordinate issue, 2095
- Supplemental bill, 2109
- Suspension of decree pending rehearing, 2110
- Time:
 - After appeal perfected, 2112
 - Carrying petition over to next term, 2111
 - English chancery practice, 2089
 - Equity rule, 2088, 2089
 - Federal practice, 2089

REIMBURSEMENT:

- Costs. see Costs
- Property wrongfully taken in receivership case, 2612

REJOINDER:

- Special rejoinder to special replication, 793

RELEASE:

- Accounts and accounting, 882
- Amendment to avoid, 1093
- Plea in bar, 832
- Plea to avoid release, 843

RELIEF:

- Bill:
 - Classification of bills not praying relief, 155
 - Original bill, 157
 - Simple bill, 154Conformity to pleadings generally, 1939
Conformity to prayer, 247, 248, 1941
Dependent upon scope of allegations, 178
Prayer for, see PRAYER FOR RELIEF

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2235-2397.)

REMAINDERMAN:

Supplemental bill to bring in remainderman, 1180

REMEDIES:

Created by state laws, see **STATE LAWS**

REMEDY AT LAW (see also DEFENSE AT LAW):

Adequacy, effect of doubt as to, 41, 42

Adequacy of remedy at law in general, 40

Assignee of interest in pending suit, 1175

Costs on dismissal of bill, 2018

Creation of new remedy, effect of, 45

Demurrer, 85, 941

Denial of injunction where legal remedy exists, 2340

Demurrer or plea, 85

Discovery, 1870

Dismissal by law court, effect of, 91

Dismissal on court's own motion, 88

Dismissal without prejudice where remedy at law exists, 1347

Effect on bill taken *pro confesso*, 1572

Effect on cross bill, 1040

Effect on right to discovery, 1870

Equity jurisdiction, exclusion of, 38

Estoppel of plaintiff, 92

Injunction cases, 2340

Jurisdiction where legal remedy would not afford complete relief, 20

Legal remedy in state court, 46, 47, 48

Loss of, 49

Misjoinder of legal and equitable causes, 89

Objection first made at hearing, 86

Objection on appeal, 87

Plea or demurrer, 85

Prayer for equitable relief, effect of, 44

Raising question:

Demurrer, 85, 941

Receiver, effect on order appointing, 2523

Replevin of property improperly taken in execution, 78

Setting aside *pro confesso* because of legal remedy, 1572

Statutory recognition of principle, 39

Time of determining jurisdiction, 43

Transfer of cause from law to equity, 90

REMOVAL OF CAUSES:

Alignment of parties in removal cases, 559

Amendment of bill to conform to federal pleading, 1095

Attorney's or solicitor's lien, 2062

Circuit court, jurisdiction of, where federal question involved, 321

Consolidation of removed causes, 1311

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

REMOVAL OF CAUSES — *continued*

- Control of federal court over injunctive process, 2391
- Costs:
 - Power of federal court, 1992
 - Power of state court, 1992
 - Remand of cause to state court, 2021
- Federal question, how pleaded, 322, 323
- Petition for removal not general appearance, 649
- Reformation of bill to conform to federal pleading, 1095

REPLEADER:

- Multifariousness requiring, 445

REPLEVIN:

- As remedy at law ousting equity jurisdiction, 78

REPLICATION:

- Admission of averments of answer by failure to traverse, 790, 797
- Admission of sufficiency of plea, 894
- Defects waived by, 795
- Dismissal for failure to reply:
 - Failure to file replication, 1344
 - Generally, 802, 803
 - Vacation of order of dismissal, 805
- Effect of failure to file in receivership proceeding, 2557
- Effect of state statute abolishing replications, 788
- Election to reply when plea sustained, 833
- Filing *nunc pro tunc*, 804, 805, 1924
- Form of, 796; and see **Forms**
- Function:
 - Cause submitted on pleadings, 832
 - General replication, 789
- General replication:
 - Function of, 789
 - Issue made by, 791
 - Purpose of, 794
- Hearing, see **HEARING ON BILL, ANSWER, AND REPLICATION**
- Insufficiency of answer, 772
- Nature and object, 891
- Necessity of, 788
- On overruling exceptions to answer for insufficient discovery, 781
- Order dismissing bill for want of replication, 803
- Origin, 891
- Pleading subsequent to replication, 793
- Receivership proceedings, 2557
- Separate replications to separate answers, 801
- Signature, 799
- Source of practice, 789
- Eq. Prac. Vol. III.—131.

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

REPLICATION — continued

Special replication:

- Abolition of, 790, 892
- Amended bill in lieu of, 790, 791
- Amendment instead of special replication, 1093
- Amendment of bill to include special replication, 893
- Functions of, 789
- Pleading in bill, 893
- Striking out, 892
- Supplemental bill in lieu of, 792
- Supplemental bill, replication to answer to, 1199
- Surplusage in, 798
- Time to file, 800, 891
- Title, 799
- Traverse of averments of answer, necessity for, 796, 797
- Trial on plea and replication, see TRIAL
- Waiver by hearing on merits, 806
- Waiver of filing out of time, 802
- When cause heard on bill and answer, 820
- Withdrawal by consent, 808
- Withdrawal by leave of court, 807

REPORT:

On reference to master, see REFERENCE.

RESIDENCE:

- Allegation of residence instead of citizenship, 330
- Demurrer for failure to allege residence, 932

RES JUDICATA:

- Amendment to avoid, 1093
- Anomalous plea negativing defense, 843
- Argument of sufficiency of plea, 914
- Decree after enrollment, 1971
- Decree sustaining plea on argument, 884
- Duplicity in plea, 853
- Failure to amend, 1085
- General decree of dismissal, 1348
- Plea in bar, 833
- Reference to ascertain truth of plea, 915
- Verdict on issues submitted out of chancery, 1542

RESTRAINING ORDERS:

See INJUNCTIONS

RETURN:

- Depositions, see DEPOSITIONS
- Writ of subpoena, see SUBPOENA, WRIT OF

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

REVIEW, BILL OF:

See **BILL OF REVIEW**

REVIVOR:

- Admissibility of evidence in original suit after revivor, 1222
- Answer in revivor suit, 1219, 1220
- Bill of, see **BILL OF REVIVOR**
- Effect on original suit, 1221
- Joinder of husband and wife on abatement by marriage, 1208
- Necessity in general on abatement of suit, 1205
- Orders:
 - Order to show cause, 1214
 - Order to revive, 1213
- Parties, see **BILL OF REVIVOR**
- Patent infringement cases, 1204
- Scire facias:
 - Not available in equity, 1226
 - Subpoena in nature of scire facias, 1227

RIGHTS:

- Creation of equitable rights by state statutes, 27, 28
- Denial of right conferred by state law, 100, 101
- Enlargement of equitable rights by state statutes, 29
- Political rights, enforcement of in equity, 33, 34

RULE DAYS:

See **INTERLOCUTORY PROCEEDINGS**

RULE DOCKET:

Definition, 1263

RULES:

- Court rules, see **EQUITY RULES OF SUPREME COURT; RULES OF PRACTICE**
- In sense of orders, see **ORDER**

RULES OF PRACTICE:

- Adoption of state practice, 116
- Application to enlarge time prescribed, 181
- Authoritative force of, 136
- Circuit court, power to make, 114, 115
- Considerations governing application of rules, 133, 134
- Construction to harmonize with statutes, 128
- Correspondence of inferior court rules with those of Supreme Court, 117
- Costs, 1988
- Departure from rule as ground for reversal, 182
- Discretion in application, 113, 130
- District Courts, power to make, 114, 115
- Equity rules of Supreme Court, see **EQUITY RULES OF SUPREME COURT**

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

RULES OF PRACTICE — continued

- Extent of power to make, 110
- Interpretation of, 127
- Jurisdiction, effect of rules on, 111
- Liberal construction, 129
- Orders in chancery, see **ENGLISH ORDERS IN CHANCERY**
- Ordinances of Lord Bacon, see **ORDINANCES OF LORD CHANCELLOR BACON**
- Particular rules, see **EQUITY RULES OF SUPREME COURT**
- Power of supreme court to make rules, 109
- Special rules in particular cases, 118
- Supreme Court equity rules, see **EQUITY RULES OF SUPREME COURT**
- Unwritten rules and usages of court:
 - Presumption as to origin, 125
 - Principles and analogies of English practice, 123
 - Validity of, 124

SALES:

- Appealability of decree ordering judicial sale, 1938
- Foreclosure sales, see **FORECLOSURE**
- Power of master to conduct sale, 1398
- Receivership sales, see **RECEIVERS**

SCANDAL AND IMPERTINENCE:

- Answer:**
 - Argumentative statements, 763
 - Defensive matter, when impertinent, 762
 - Definitions, 761
 - Exceptions for, see *infra*, Exceptions
 - Exhibits, 768
 - Inducement to material averments, 764
 - Insufficiency and impertinence distinguished, 766
 - Irrelevant but responsive matter, 767
 - Irrelevant matters generally, 765
 - Matters appropriate for cross bill, 1023
 - Matters not at issue, 765
 - Non-issuable matters, 765
 - Order to recast, 771
 - Superfluous allegations, 764
 - Test of, 761
- Attitude of courts, 769
- Exceptions:**
 - Amended answer, 1163
 - Disposal of, 297
 - Equity rule, 760
 - Form and sufficiency, 295, 758, 759
 - Inherent power of court, 756
 - Liberality of practice, 757
 - Loss of right to file, 756

INDEX.

2085

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

SCANDAL AND IMPERTINENCE—*continued*

Exceptions—*continued*

- Reference to master, 760
- Scope of, 296
- Time for taking, 294, 756
- Waiver by reference of answer for insufficiency, 756
- Forms relating to, see FORMS
- Judicial discretion, 770
- Liberality of courts in regard to, 293, 757
- Petition, 1297
- Prolixity distinguished from impertinence, 292
- Report of master, 1455
- Test of, 291

SCIREE FACIAS:

- Foreclosure of mortgages, 2814
- Not available in equity to revive, 1226
- Subpoena in nature of scire facias, 1227

SEAL:

- Authority of attorney to appear for corporation, 641
- Writ of subpoena, 585

SEAL DAYS:

- English chancery, 1263

SECURITY FOR COSTS:

- Bill of review, 2168
- Bond for costs:
 - Form of, 577
 - In lieu of deposit, 576
 - Time of tendering, 577
- Deposit in court, 578
- Exemption of poor persons, 578, 579
- Manner of giving, 576
- Nonresidents generally required to give, 574
- Power of court to adopt local rules, 575
- Power of court to require increase of security, 577
- Residents not generally required to give, 574
- State practice not binding on federal court, 575

SEPARATE PROPERTY OF MARRIED WOMEN (see also MARRIED WOMEN):

- Equity jurisdiction of suit to protect, 56
- Parties in suit by wife to protect, 465

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

SEPARATION OF LAW AND EQUITY:

- Applications of principle, 13
- Cognizance of legal matters in equity, 19
- Combining legal and equitable matters in declaration, effect of, 18
- Completeness of separation, 10
- Control by Congress, 11
- Equitable defense in action at law, 16
- Equitable matters not available at law, 14
- Equitable title, availability of at law, 17
- Exclusion of equitable questions in legal proceedings, 15
- Judiciary Act, recognition of distinction by, 6
- Law and equity distinct though in same court, 5

SEQU'ESTRATION:

- Disobedience of subpoena:
 - Analogy to distress, 668
 - Analogy to receivership, 668
 - Corporation defendant, 674
 - Disposition of property taken, 670
 - English practice, 667
 - Form of writ, 669
 - Proper means process in federal courts, 663, 667
 - Property that may be sequestered, 671
 - Rule of court governing, 667
 - Sequestrators, aid of by process of court, 672
 - Sequestrators officers of court, 670
 - Sequestrators, right of in regard to property taken, 671
- Disobedience of writ of execution of decree, 2212
- Enforcement of decree by, 2212-2214
- Injunction in aid of, 672
- Petition where property of stranger sequestered, 1294

SERVICE OF PROCESS (see also SUBPOENA, WITNESS OR):

- Bill taken *pro confesso*:
 - Amended bill, 1555, 1556
 - Cross bill, 1554
 - Necessity in general, 1554
 - Original bill, 1554
 - Substituted process, 1557
- Bill to perpetuate testimony, 1767
- Court order in lieu of original process, 628
- Cross bill:
 - Necessity, 1065
 - Prerequisite to taking *pro confesso*, 1554
 - Substituted or constructive service, 1066
- Defendants in court by amended bill, 1129
- Parties added by amendment, 1129
- Prerequisite to taking bill *pro confesso*, 1554

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2334; III, §§ 2285-2897.]

SERVICE OF PROCESS — *continued*

Statutory substitute for service:

- Adverse citizenship cases, 631
- Citizenship unknown, 632
- Collateral attack on orders, 636
- Construction of statutes generally, 629
- Defendant residing in district but not found, 630
- Generally, 628-639
- Nonresident defendant, 634
- Order for defendant to appear, 637
- Order of application, 638
- Personal service of court order, 628
- Proof accompanying application, 635
- Publication of notice, 628
- Requisites of publication, 639
- Residence unknown, 632
- Resident defendant, 633

Subpoena, see **SUBPOENA, WRIT OR**

Substituted service on attorney or agent:

- Affidavit for obtaining order, 617
- Application for order, 617
- Authority of counsel as affecting, 620
- Authority of counsel, determination of, 621
- Availability in ancillary suits generally, 624
- Copy of bill, 613
- Cross-suits, 613, 622, 623, 1066
- Equity of bill as affecting, 626
- Form of bill as affecting, 625
- Nature and origin, 615
- Necessity of obtaining order, 616
- Notice or subpoena to defendant out of district, 619
- Not permissible on original bill, 614
- Serving copy of order, 618
- Subpoena, 613
- Validity of, how tested, 627
- What constitutes generally, 613

Writ of execution of decree, 2211-2213

SET-OFF:

- Against intervenor in receivership, 2573
- Answer pleading set-off as defense, 747
- Availability of in suit against government, 480
- Costs, 2029, 2030
- Defense at law affecting equity jurisdiction, 83

SETTING DOWN FOR HEARING:

See **HEARING**

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2807.]

SEVERANCE:

Multiparousness requiring, 445

SIGNATURE:

Affidavit, 1308
Answer, see ANSWER
Bill, see BILL
Decree, 1955
Demurrer, 954
Depositions, 1687, 1808
Petition, 1297
Plea, 868
Replication, 798
Supplemental bill, 1183

SMITH, JOHN S.:

Authority of treatise on chancery practice, 121

SOLICITOR (see also ATTORNEY; COUNSEL):

Authority to enter appearance, see APPEARANCE
Authority to institute suit:
 Affidavit to show, 572
 Discretion of court on motion to dismiss, 573
 Dismissal for want of authority, 571
 Must extend to all parties, 569
 Presumption of authority, 571
 Retainer as authority, 568
 Special authority essential, 568, 572
 Writing not essential, 570
Costs between solicitor and client, see COSTS
Distinction between solicitors and counsel in federal practice, 566
Function under English practice, 564
Lien of, 2061, 2062
Necessity of employment, 563
Officer of court, 571
Power to answer, 687
Right to appear at hearing, 1907

SOVEREIGN:

Capacity to be sued, 479-481
Foreign sovereign, right to bring suit against, 483
Right to sue, 479

SPECIFIC PERFORMANCE:

Costs, apportionment of, 2024
Lease of receivership property, 2651
No caveat, 2265
Parties necessary in suit for, 511

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

SPECIFIC PERFORMANCE — *continued*

- Receiver's petition for performance of existing contract, 2642, 2643
Relief grantable under general prayer for relief, 251

STATE COURT:

- Interference with jurisdiction of federal court, see Courts

STATE LAWS:

- Abolishing replication, effect in federal practice, 788
Aggregation of claims, 371
Appointment of receivers, 2528
Competency of witnesses, effect on, 1648, 1649
Conferring exclusive jurisdiction, effect of, 24
Continuance for interpretation of, 1320
Creation of equitable rights by, 27, 28
Depositions in conformity with, 1733-1735
Defining equitable rights, 100
Effect of, on federal equity jurisdiction, 23, 315
Effect of state practice on federal, 98
Effect on admissibility of evidence taken under bill to perpetuate, 1776
Effect on right to maintain cross bill, 1035
Enlarging equitable rights, illustrations of, 29
Foreclosure proceedings. see Foreclosure
Form and mode of securing rights guaranteed by state statutes, 101
How far federal court must follow state statute, 101
Lien of decree as affected by, 2200, 2201
Limitations of doctrine of creation of equitable rights, 30
Power of federal courts to adopt state practice, 99
Quieting title, 63
Receivership proceedings, see RECEIVERS
Relevancy in determining sufficiency of pleadings, 102
Remedies created by, when adopted by federal courts, 31
Review in federal courts for failure to follow state ruling, 2137
Rules of decision in federal courts, 7
Suit against United States not authorized by, 481

STATES:

- Capacity to be sued, 482
Capacity to sue, 447
Formal or nominal party, 536
Jurisdiction of suits between states, 482
Jurisdiction of suits between states and individuals, 482
Right to bring suit against, 482
Waiver of immunity from suit, 482

STATUTE OF FRAUDS:

- Demurrer to bill within statute, 941
Plea in bar, 832

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-3005.]

STATUTE OF GLOUCESTER:

Costs, 1981

STATUTE OF LIMITATIONS:

- Abatement and revivor of suit, 1221
- Allegations in avoidance of, 218
- Amendment to avoid, 1093
- Deficiency decree in foreclosure, 2895
- Definiteness and certainty of plea, 854
- Demurrer or plea, 942
- Foreclosure proceedings:
 - Deficiency decree, 2895
 - State statutes, 2817, 2847
 - Who may set up statute, 2848
- Laches, how affected by, 212
- Plea in bar, 832
- Plea to avoid bar of statute, 843
- Relation back of amendment to defeat statute, 1103
- Revived suit, 1221
- Supplemental bill to prevent bar of statute, 2231

STATUTE OF MARLBOROUGH:

Costs, 1981

STATUTES:

- Acts of Congress regulating federal practice, 167
- Construction of rules to harmonize with, 128
- Judiciary Act, see JUDICIARY ACT
- State, see STATE LAWS

STAY OF PROCEEDINGS:

- Bill of review, stay pending payment of costs, 2172
- Foreclosure suit pending action at law, 2836
- Injunction against judgment at law, 2901
- Injunction staying proceedings on filing bill of review, 2128
- Orders, 1310
- Supersedeas, see SUPERSIDEAS

STENOGRAPHERS:

- Fees in proceedings before master as costs, 1987
- Report of testimony taken through interpreter, 1805
- Use in taking statutory depositions on notice, 1728

STIPULATIONS:

- Application of proceeds of foreclosure sale, 2874
- Conditions of appointment of receiver, 2561
- Entry of decree, 1959
- Withdrawal of replication by stipulation, 808

INDEX.

2091

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

STOCK AND STOCKHOLDERS:

- Appealability of decree, 1938
- Right of stockholder to answer in behalf of corporation, 688
- Suits by stockholders:
 - Alignment of parties, 562
 - Collusion, dismissal for, 473
 - Collusion, when immaterial, 474
 - Conditions required by equity rule, 94, 469
 - Corporation as defendant, 469
 - Demand on directors, when unnecessary, 472
 - Effort to procure suit for corporation, 471
 - Equity rule 94 inapplicable after dissolution, 476
 - Equity rule 94 inapplicable in removal cause, 475
 - Equity rule 94 inapplicable on suit in individual right, 477
 - Multifariousness, 437, 438
 - Suit in right of corporation, 469
 - Types of stockholders' suits, 470

STRIKES:

See LABOR COMBINATIONS

STRIKING OUT:

- Amendments, 1104, 1116
- Bill of revivor, 1215
- Damur or motion to strike, 932
- Incompatible pleadings, 983
- Informality, 306
- Motion to dismiss distinguished from motion to strike, 1346
- Motion to strike plea, 875
- Plea supported by answer, 1005
- Special replication, 892

SUBMISSION OF ISSUES:

See ISSUES TO JURY

SUBPOENA DUCES TECUM (see also PRODUCTION OF DOCUMENTS):

- Application:
 - Affidavit, 1843
 - Determination of application, 1844, 1845
 - Form in general, 1843
 - Inquiry into relevancy and materiality of evidence, 1845, 1846
 - Laches, 1848
 - Showing of necessity, 1847
- Contents:
 - Description of document generally, 1849
 - Subpoena calling for telegrams, 1850

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.)

SUBPOENA DUCES TECUM — continued

- Definiteness and certainty, 1849, 1850
- Deposition taken on notice, 1841
- Duty of witness to search for documents, 1852
- Function, 1851
- Issuance:
 - English chancery, 1834
 - Necessity, 1847
 - Power of court, 1836
 - Production by parties and witnesses generally, 1833
 - Who may issue, 1837
- Motion to vacate or set aside, 1842

Nature, 1834

Necessity where witness in court, 1835

Practice where witness questions duty to produce, 1842

Privileged documents:

- Communications between attorney and client, 1858
- Communications between husband and wife, 1857
- Communications between patent office and applicant, 1859
- Documents containing trade secrets, 1855
- Invasion of privacy discouraged, 1854
- Qualified privilege, 1856
- Production of chattels, 1851
- Production of documents before commissioner, 1838, 1839
- Production of documents before examiner, 1840
- Relevancy and materiality of documents, 1845
- Use of documents produced, 1853

SUBPOENA TO HEAR JUDGMENT:

See **HEARING**

SUBPOENA, WRIT OF:

Address:

- Enumeration of defendants, 589
- Fictitious names, 589
- Husband and wife, 590
- Number of names in one subpoena, 590

Alias writ, 592

Appearance day, memorandum of, 586

Attachment for disobedience:

- Alias writ, 667
- Bail, 676
- Custody of defendant, 675
- Discretion of court, 664
- English practice, 584
- Execution, 666
- Form of writ, 665
- Pluries writ, 667

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

SUBPOENA, WRIT OF — continued

Attachment for disobedience — *continued*

Return to writ, 665, 666, 675

Notice of motion to attach, 2466, 2467

Commencement of suit by service, 582

Date, 585

Decree *pro confesso* for disobedience of, 584

Duplicate writs for defendants in different districts, 591

Forms relating to, see FORMS

Issuance:

Application of plaintiff under equity rule, 586

Filing of bill as prerequisite, 587

Præcipe or subpoena note, 587

Origin and history, 583

Penalty of, 584

Pluries writs, 592

Representative defendants, 593

Return:

Affidavit, 603

Amendments, 606

Conclusiveness of recital of facts, 607

Corporate defendant, 608, 609

Determination of return day, 602

False return, remedy for, 607

Impeachment of, 607

Impeachment of for incompetency of agent served, 609

Judicial notice of sufficiency, 604

Recital as to capacity in which defendant served, 604

Recital as to district in which service made, 604

Service by leaving copy, 605

Statement of acts of officer, 603

Time as dependent on rule days, 1266

Time of return, 602

Vacation of, form of order, 610

Revivor by subpoena in nature of *scire facias*, 1227

Seal, 585

Service:

Acceptance of service, 598

Appointment where marshal or deputy is party, 594

Beyond jurisdiction of court, 597

Clerks, service by, 594

Corporate defendant, 599, 600

Delivery of copy, 595

Infant defendant, 601

Marshal or deputy, service by, 594

Mode of service under equity rule, 595

Officer of corporation, 599, 600

On guardian *ad litem* or general guardian, 601

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

SUBPOENA, WRIT OF — continued

- Service — continued
 - Place of abode, 596
 - Substituted service, see Service of Process
 - Waiver of defective service, 598
 - Who may make service, 594
- Showing capacity in which defendant is sued, 593
- Supplemental bill, 1164
- Teste, 585

SUBSTITUTED SERVICE OF PROCESS:

See Service of Process

SUIT IN EQUITY:

- Distinguished from action at law, 135
- Essentials of, in general, 140

SUMMARY PROCEEDINGS:

- Punishment of contempt, 2461

SUPERSEDEAS:

- Ancillary proceeding to stay action of ejectment, 1236
- Injunction against judgment at law, 2301

SUPPLEMENTAL BILL:

- Abatement of suit, 1161
- Amendment instead of supplemental bill, 1156, 1157
- Amendment introducing new cause of action, 1092
- Amendment and supplemental bill compared, 1156
- Ancillary proceeding, 1238
- Answer:
 - Defenses available in answer, 1197
 - Duty to answer, demur, or plead, 1197
 - Necessity of answering simple supplemental bill, 1175
 - Replication to answer, 1199
 - Scope of answer, 1198
 - Separation of answers to original and supplemental bills, 1198
 - Time to answer, 1195

Basis:

- Curative deed, 1165
- Deed of release, 1165
- Evidentiary facts, 1162
- Materiality and nature of new facts, 1162
- Newly acquired title, 1164
- New oral testimony, 1162
- Relevancy to original bill, 1168-1171
- Validity of original bill, 1163

Bill in nature of bill of review, 2124, 2130, 2176, 2179

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

SUPPLEMENTAL BILL — continued

Bill in nature of supplemental bill:

Answer, 1175

Form and contents, 1191

Illustrations of necessity, 1174

Necessity on transfer of entire interest *pendente lite*, 1173, 1174

Original and independent proceeding, 1175

Supplemental and amended bill, 1191

To bring in remainderman after termination of life estate, 1180

Bill of review, supplement, and revivor, 2125

Bill of revivor, see **BILL OF REVIVOR**

Bill to effectuate decree, 2226

Change of interest *pendente lite*:

Assignee of interest in pending suit, 1175

Bill in nature of supplemental bill, 1173-1180

Distinction between transfers by plaintiff and by defendant, 1176

Executors and administrators, 1177

Guardian, 1177

Partial transfer of interest, 1172

Prayer for discovery, 1198

Successor of person suing in representative capacity, 1177, 1178

Tenant in tail, 1179

Transfer of entire interest, 1179

Trustee, 1177, 1178

Compromise agreement, 1169

Contents, see *infra*, Form and contents

Cross bill, supplemental bill in nature of, 1181

Decree *pro confesso*, 1559

Definition, 145

Demurrer:

Availability of, 917

Duty to demur, plead, or answer, 1197

Grounds of demurrer, 1196

Time to demur, 1195

Where amendment available, 1156

Departure from case made in original bill, 1171

Discovery by, 1160, 1198

Discretion of court:

Dismissal or striking out for want of leave to file, 1185

Leave to file, 1183, 1184

Effect of liberty of amendment, 1157

Evidence on issue made, 1200

Filing:

Following practice on original bill, 1193

Time to file, see *infra*, Time to file

Form and contents:

Bill in nature of supplemental bill, 1191

Bill seeking general relief granted in former suit, 1199

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

SUPPLEMENTAL BILL — continued

Form and contents — continued

- Bill to revive decree, 1180
- Contradictory or inconsistent matter, 1187
- Equity rule, 1188
- Informal supplemental bill, 1190
- Materality of matters brought forward, 1187
- Original pleadings, 1188
- Petition to amend decree, 1190
- Prayer, 1193
- Recitals, see *infra*, Recitals

Former use, 1169

Function and purpose:

- Affirmative relief to defendant, 1181
- Aid of final decree, 1167
- Bringing in new parties, 1167
- Change of interest *pendente lite*, see *supra*, Change of interest *pendente lite*
- Discovery in aid of prior decree, 2230
- Impeachment of decree, 1167
- In general, 1155
- Renewal of decree about to be barred, 2231

Hearing, 1201

Incorporation in matter of amendment, 1158

Informal supplemental bill, 1190

Injunction cases, 2441, 2442

In lieu of special replication, 792

Introduction of new cause of action, 1090

Jurisdiction, 1238

Leave of court:

- Bill in form of original bill treated as supplemental bill, 1190
- Bill in nature of bill of review, 2179
- Diligence to be shown, 1184
- Discretion of court, 1183, 1184
- Equity rule, 1182
- Matters considered on application, 1182
- Necessity of leave, 1182
- Objections for want of leave, 1185
- Power to grant leave where amendment available, 1157
- Time of application as affecting grant of leave, 1184

Matters available by supplemental bill:

- Agreement between parties, 1166
- Aid of final decree, 1167
- Bringing in new party, 1166
- Change of interest *pendente lite*, 1172-1180
- Death of wife in joint action, 1166
- Discovery, 1160
- Enactment of new statute, 1166

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2284; III, §§ 2285-2897.]

SUPPLEMENTAL BILL — continued

Matters available by supplemental bill — continued

- Impeachment of decree, 1167
- Lunacy arising after institution of suit, 1166
- Modification of relief originally sought, 1168
- New matters generally, 1159, 1162
- Payment of costs on proceeding to review, 1164
- Title perfected after filing of bill, 1164, 1165

Matters not proper for supplemental bill:

- Abatement of suit, 1161, 1202
- Contradictory evidence, 1162
- Corroborative evidence, 1162
- Defects available by amendment, 1156, 1157
- Defects rendering bill wholly invalid, 1163
- Elimination of parties defendant, 1185
- Facts in existence at filing of original bill, 1159
- Facts provable under original bill, 1162
- Title acquired after institution of suit, 1164

Nature, 1155

Necessity:

- Applications for rehearing, 2109
- Effect of availability of amendment, 1156, 1157
- Introduction of new facts, 1157, 1158

New parties:

- After decree, 1167
- Change of interest *pendente lite*, 1172-1180
- Person ratifying act previously done, 1166

Order for cause to stand over, 1186

Parties:

- Defendant, 1192
- Plaintiff, 1181
- Right of original defendant to file, 1181

Petition to amend decree, 1190

Plea, 1195, 1197

Prayer:

- Adaptation to special object of bill, 1198
- Discovery of matters in original bill, 1198
- Prayer for process, 1193
- Relevancy to original prayer, 1170

Present use, 1159

Process, 611, 1194

Recitals:

- Alteration of parties, 1187
- Filing of original bill, 1187
- New matters giving occasion for filing, 1187
- Original pleadings, 1188
- Proceedings on original bill, 1187

Eq. Prac. Vol. III.—132.

(References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.)

SUPPLEMENTAL BILL — *continued*

- Rehearing, supplemental bill in connection with, 2109
- Relevancy to original bill:
 - Compromise agreement, 1160
 - Departure from case made in original bill, 1171
 - Necessity of relevancy in general, 1168
 - Prayer, 1170
- Replication, supplemental bill in lieu of, 792
- Replication to answer to, 1199
- Setting up matters unknown or deemed impertinent, 1159
- Setting up new defense, 1159
- Signature, 1193
- Subpoena to appear and answer, 1194
- Time to file, 1167
- Transfer of interest *pendente lite*, see *supra*, Change of interest *pendente lite*
- Use on petition for rehearing, 2109
- Waiver of preliminary injunction by filing supplemental bill, 2393

SUPREME COURT:

- Equity rules, see EQUITY RULES OF SUPREME COURT
- Origin of equity jurisdiction, 2
- Petition *pro interessu suo in*, 1885
- Power to make rules of practice, 109
- Right to regulate federal equity practice, 108

SURETIES:

- Right to be heard on motion, 1277

SURPLUSAGE:

- Answer to matters constituting surplusage unnecessary, 727
- Inconsistency in answer as surplusage, 763
- In demurrer, 923
- In replication, 798
- Plea good in part and bad in part, 882
- Report of master on reference, 1455

TAKING BILL PRO CONFESSO:

- Admissions incident to allowance of, 1564
- Amended and supplemental bill, 1569
- Amended bill, 1555, 1556
- Answer, want of, 1552, 1558
- Appearance, want of, 1552
- Bill as evidence for plaintiff, 1582
- Bill to perpetuate testimony, 1773
- Contempt, *pro confesso* not grantable as punishment for, 1863
- Cross bill, 1554
- Decree:
 - Against married woman, 1558

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

TAKING BILL PRO CONFESSO — *continued*

Decree — *continued*

- Appeal from decree, 971
- Disobedience to subpoena, 584
- Effect of amendment of bill on right to answer, 1134
- Effect on right to test sufficiency of bill, 1564
- Equity rules, 1563, 1568
- Evidence supplementing allegations of bill, 1568
- Failure of proof to support plea, 911
- Failure to answer after demurrer overruled, 968
- Failure to answer amended bill, 1135
- Failure to answer in general, 678
- Force and effect of final decree, 1571
- Lack of verification, 867
- Nature of decree grantable, 1566
- Notice of application, 1565
- Notice of reference to master, 1428
- On sustaining exceptions to answer, 782
- Refusal to plead after demurrer overruled, 971
- Right of defendant to be heard, 1565
- Scope, 1564
- Setting aside, see *infra*, Setting aside orders and decrees
- Substitute for process to compel appearance, 663, 673, 674
- Time of making, 1563
- Defense to injunction bill, 2434
- Demurrer, want of:
 - Failure to plead, answer, or demur, 1552
 - Want of affidavit or certificate to demurrer, 955
- Ex parte* procedure, 1559, 1563
- Grounds, 1552
- Hearing:
 - Order on final hearing, 1922
 - Right of defendant to be heard, 1565
 - Time of setting down for hearing, 1563
- Infants, 1558
- Insane persons, 1558
- Laches, effect on right to set aside *pro confesso*, 1573
- Married women, 1558
- Modern equity practice, 1551
- Notice, 1562
- Occasions when *pro confesso* may be taken, 1552
- Order:
 - Application to clerk, 1559
 - Effect generally, 1559
 - Grant as of course, 1559
 - Necessity for formality, 1560
 - Service of copy, 1562
- Setting aside order, see *infra*, Setting aside orders and decrees
- Waiver of irregularity in taking order, 1561

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

TAKING BILL PRO CONFESSO — *continued*

- Origin of practice, 1551
- Persons under disability, 1558
- Plea, want of, 1552
- Practice where part of defendants make defense, 1567
- Proceedings incident to entering orders and decrees generally, 1569-1571
- Reference to master 1569, 1570
- Right of defendant to be heard, 1565
- Service of process:
 - Amended bill, 1555, 1556
 - Cross bill, 1554
 - Necessity in general, 1554
 - Original bill, 1554
 - Substituted process, 1557
- Setting aside orders and decrees:
 - Acquiescence, effect of, 1573
 - Affidavit in support of application, 1574
 - Application to set aside, 1572
 - Defendant in contempt of court, 1572
 - Final decree, 1571
 - Ignorance of counsel, 1572
 - Inadvertence as ground, 1572
 - Laches, effect of, 1573
 - Lack of jurisdiction, 1572
 - Mistake as ground, 1572
 - Offer to restore benefit obtained, 1575
 - Remedy at law, 1572
 - Tender of answer with application, 1574
- Supplemental bill, 1559
- Want of affidavit or certificate to demur, 955
- Withdrawal of amended bill as affecting right, 1556

TAXATION:

- Jurisdiction to enjoin enforcement of tax law, 72, 73
- Levy on property in hands of receiver, 2603
- Of costs, see Costs
- Preference of tax claim on receivership fund, 2738
- Receiver's petition for relief against taxes, 2739

TENDER:

- Costs as affected by tender:
 - Effect of tender on liability generally, 2008
 - Excuse for failure to tender exact sum, 2011
 - Payment into court, 2010
 - Requisites of tender, 2009
- Payment into court generally, 1325
- Plea in bar, 832

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

TERRITORIES:

Organic acts as affecting practice in federal courts, 105, 106

TESTE:

Writ of subpoena, 585

TESTIMONY:

See **EVIDENCE**

TESTIMONY, PERPETUATION OF:

See **PERPETUATION OF TESTIMONY**

TEXT-BOOKS:

Authority of English text-books in federal courts, 121

TIME FOR TAKING PROOF:

See **EVIDENCE**

TIME TO PLEAD:

Answer, see **ANSWER**

Demurrer, see **DEMURRER**

Plea, see **PLEA**

Replication, see **REPLICATION**

TITLE:

Allegation of, 205

Costs in suits involving title to realty, 1999

Equitable title, availability of at law, 17

Equitable title to legal right of action, 57

Interest of receiver, see **RECEIVERS**

Intervention on claim of legal title, 1353

Multifariousness in joinder of different titles, see **MULTIFARIOUSNESS**

Of answer, 691

Of replication, 799

Supplemental bill to show title, 1164, 1165

TORT, ACTION OF:

Jurisdiction of equity, 52

TRADEMARKS:

Forms relating to, see **FORMS**

Infringement:

Apportionment of costs, 2022

Right to recover costs, 2000

Multifariousness in suits relating to, 424

TRESPASS:

Equity jurisdiction, 59

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2285-2897.]

TRIAL:

- Jury trial, see **ISSUES TO JURY; JURY**
On plea and replication:
 Affidavits, 897
 Burden of proof, 896
 Issue on trial, 895
 Manner of taking proof, 895
 Plea as evidence, 897
 Plea established by proof:
 Decree where plea contains complete defense, 904
 Decree where plea sustained as to part, 901
 Dismissal of bill — change by equity rule, 900
 Dismissal of bill — former practice, 899
 Waiver of insufficiency by going to trial, 900, 902
Plea not supported by proof:
 Decree *pro confesso*, 911
 Discussion of rules, 907
 Effect of equity rules, 906, 907
 Order to defendant to make discovery, 910
 Original rule as to decree, 905
 Policy of rule, 909
 Practice in circuit court and circuit court of appeals, 908
 Reserving benefit of plea to final hearing, 913
 Quantum of proof, 898
 Refusal to try issue on immaterial plea, 903

TRUSTS AND TRUSTEES:

- Certainty requisite in bill to declare trust, 198, 199
Costs, 1997, 2041, 2047
Intervention by beneficiaries, 1358
Intervention by trustees, 1359
Power of trustee to deal with receivership property, 2604
Reimbursement for costs, 2041, 2047
Right of trustee to be heard on motion, 1277
Supplemental bill to bring in successor after trustee, 1177, 1178
Trustee formal or nominal party, 538
When trustees necessary parties, 513, 514

UNINCORPORATED ASSOCIATIONS:

- Contempt proceedings, 2494
Parties in suits by or against, see **PARTIES**

UNITED STATES:

- Capacity to sue, 447
Right to bring suit against, 480, 481

UNWRITTEN RULES:

- Rules of practice, 122-125

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2807.]

USAGES OF COURT:

As rules of practice, 128-125

USURY:

Cross bill charging usury, 1052
Defense to foreclosure suit, 2853
Receivers' certificates, 2780
Usurious contracts, jurisdiction of equity, 37

VACATION:

Decree, vacation of, see DECREE
Injunctions granted in vacation, see INJUNCTIONS
Interlocutory proceedings, 1270

VENUE:

Acts not constituting waiver of defect, 389
Affidavit, 1304
Demurrer, when appropriate, 382
District other than that prescribed by statute, 382, 383
District where suit to be brought, 382
Diverse citizenship as affecting, 382
Jurisdiction and venue distinguished, 383, 384, 385
Motion to vacate service for wrong venue, 391
Plea in abatement for district, 394
Single and plural parties, 393
Special appearance to test question, 390
Waiver of defect, 386-388
Who may object, 385

VERDICT:

Issues submitted out of chancery, see ISSUES TO JURY

VERIFICATION:

Particular kinds of pleadings, see the titles in this Index dealing with those pleadings

VOLUNTARY ASSOCIATIONS:

See UNINCORPORATED ASSOCIATIONS

WAGES:

Receivers, payment of wages by, 2622, 2741

WAIVER:

Answering to merits as waiver of defects, 714
Benefit of demurrer, 962
Certificates of counsel to demurrer, 956
Defects in notice of special motion, 1286
Defects waived by replication, 802, 806
Dissolution of injunction for waiver of delinquency, 2406
Failure to demur, 714, 944

[References are to sections. Vol. I, §§ 1-1014; II, §§ 1015-2234; III, §§ 2235-2897.]

WAIVER — continued

- General demurrer, waiver of defect of venue, 387
- Incompetency of witness, 1652
- Oath to answer, see ANSWER
- Objections to jurisdiction, 595, 658
- Plea, waiver of by answering, 871
- Service of writ of subpoena, 598

WATER RIGHTS:

- Multifariousness in bill to test, 418

WITNESSES:

Compelling attendance:

- Before examiner of court, see PROCEEDINGS BEFORE EXAMINER
- Statutory depositions on notice, 1725-1727
- Witness to prove exhibit, 162

Competency:

- Incapacitation after deposition taken, 1651
- Law governing competency, 1647
- Parties, 1653
- Privileged persons, 1649
- Release incident to examination of defendant, 1653
- State law, operation and effect of, 1648, 1649
- Statute in regard to, 1647
- Waiver of incompetency, 1652
- Witness to transactions with deceased persons, 1650

Cross-examination, see CROSS-EXAMINATION

Examination of witnesses, see CROSS-EXAMINATION; DEPOSITIONS; EVIDENCE; PERPETUATION OF TESTIMONY; PROCEEDINGS BEFORE EXAMINER

Impeachment:

- Bill of review for new evidence to impeach witnesses, 2154
 - Leave of court, 1654
 - Mode of examination for impeachment, 1655
- Perpetuation of testimony, see PERPETUATION OF TESTIMONY
- Privileged persons, 1649
- Production of documents, see PRODUCTION OF DOCUMENTS; SUBPOENA DUCES TECUM
- Re-examination, see DEPOSITIONS

WOMEN:

- Married women, see MARRIED WOMEN

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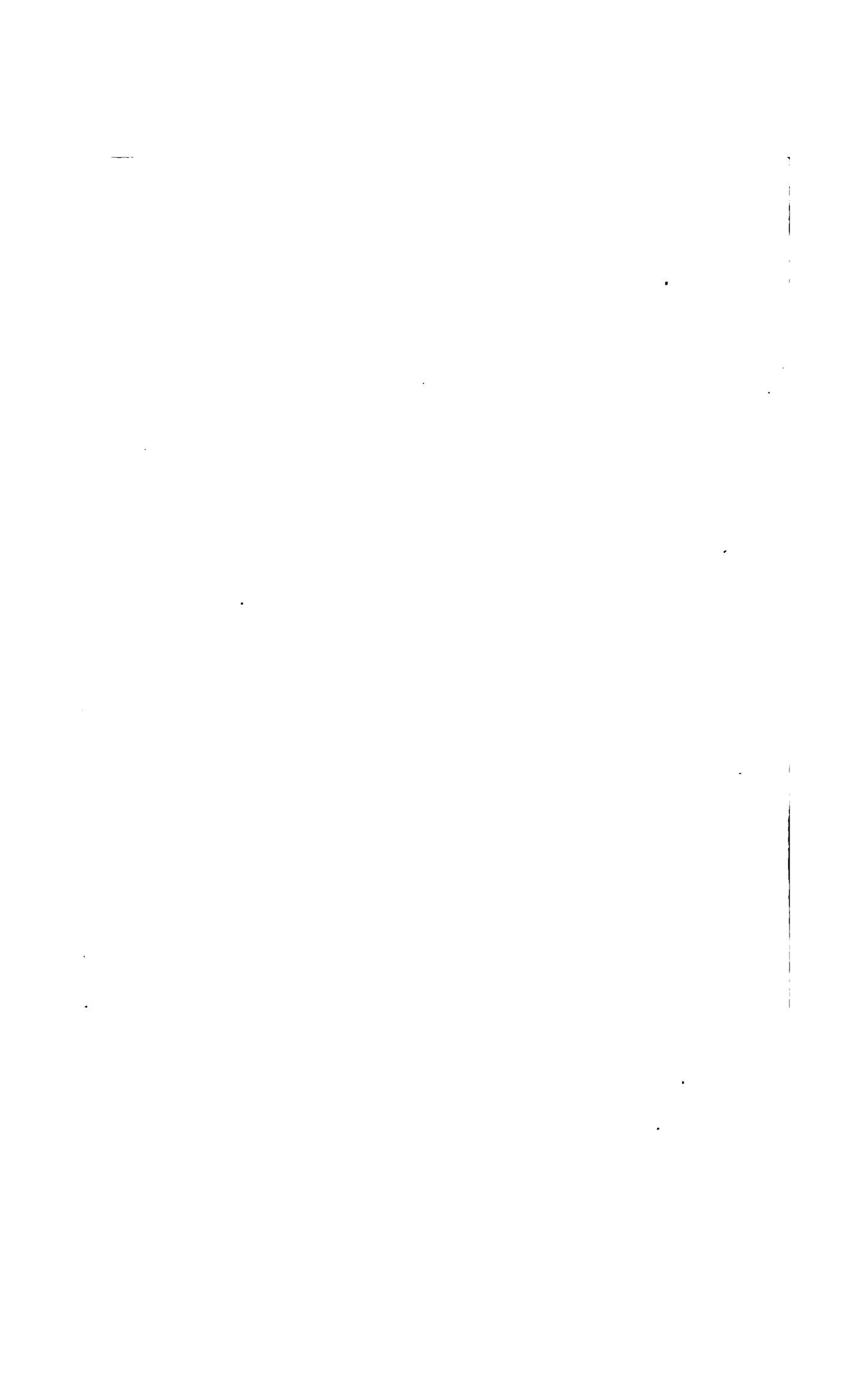
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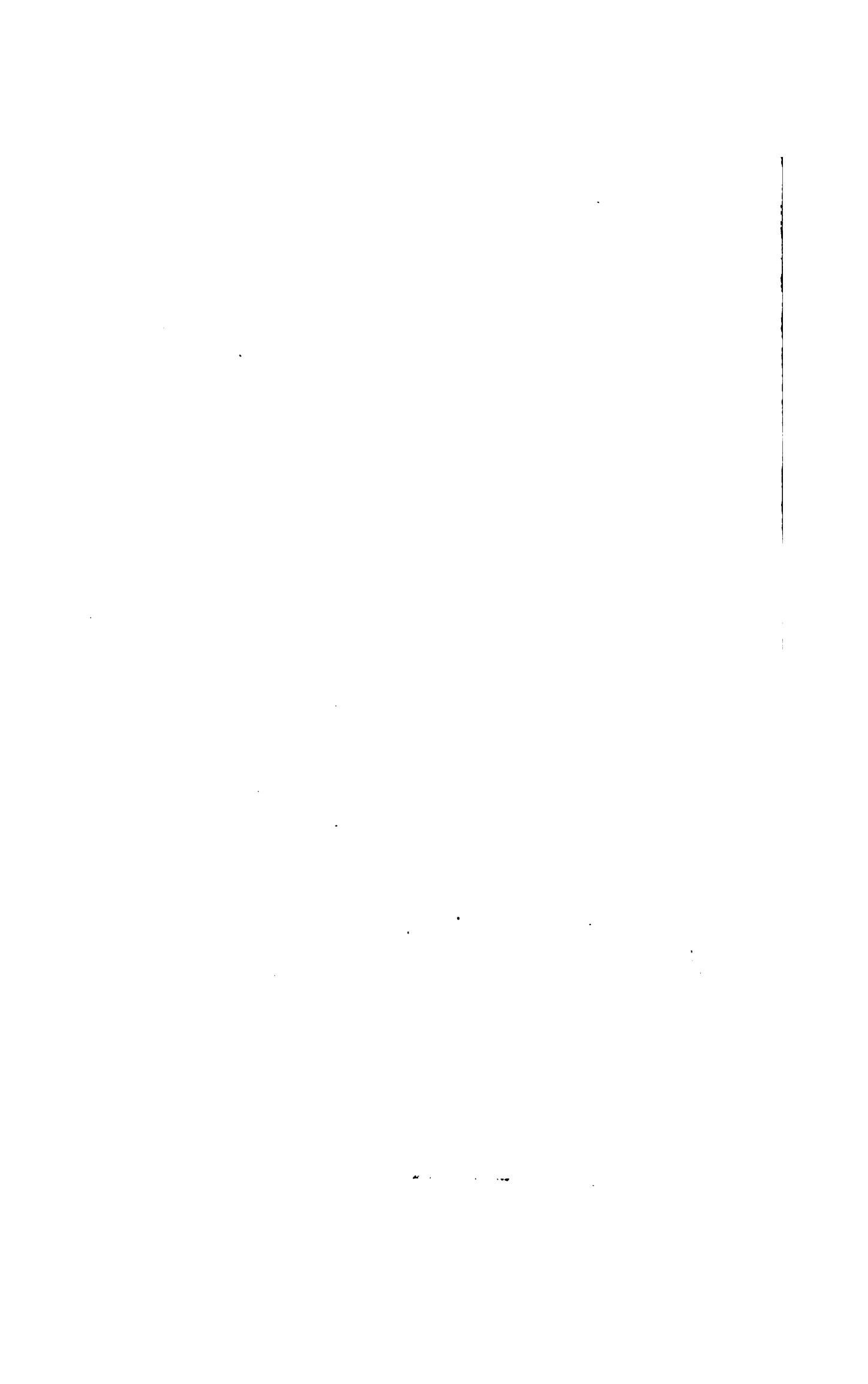
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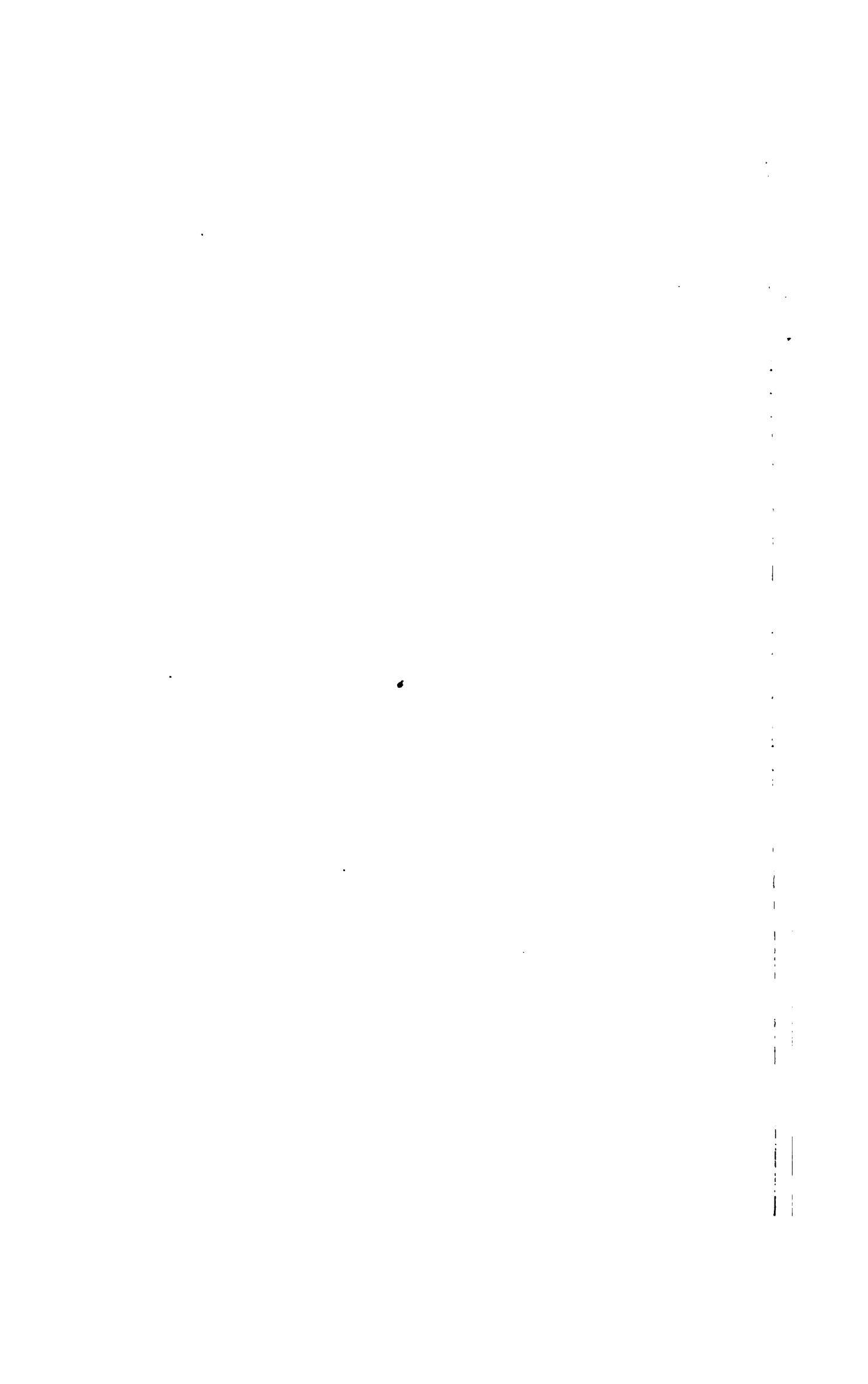
- See ASSISTANCE, WRIT OF

WRIT OF POSSESSION:

- Distinguished from writ of assistance, 2218







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